STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO.: PN34XB-03008

Harriet Bernstein and Luisa Paster, and J. Frank Vespa-Papaleo, Director, New Jersey Division on Civil Rights, Complainants, v. Ocean Grove Camp Meeting Association, Respondent.	**FINDING OF PROBABLE CAUSE**

Pursuant to a verified complaint filed on June 19, 2007, the above-named Respondent has been charged with unlawful public accommodation discrimination based on civil union status, within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, *et seq*.) and specifically N.J.S.A. 10:5-4 and 10:5-12(f).

SUMMARY OF COMPLAINT:

Complainants alleged that, in or around March 2007, they applied to Respondent for permission to rent its Boardwalk Pavilion for their civil union ceremony, and Respondent denied their request. Complainants further alleged that, at the time of their application, Respondent routinely rented its Boardwalk Pavilion for weddings and other secular and religious events.

SUMMARY OF RESPONSE:

Respondent admitted that, although it permitted its Boardwalk Pavilion to be used for weddings in the past, it refused to permit Complainants to use its Boardwalk Pavilion for a civil union ceremony. Respondent contended that it informed Complainants that it could not permit use of the Boardwalk Pavilion for a civil union ceremony because such use would conflict with its religious beliefs. Respondent contended that the New Jersey Law Against Discrimination (LAD) does not apply to religious organizations in connection with the rental of real property, and further contended that it is not required to permit civil union ceremonies in its Boardwalk Pavilion based on its rights under the First Amendment to the

U.S. Constitution.

BACKGROUND:

Respondent Ocean Grove Camp Meeting Association is a non-profit corporation founded in 1869. Respondent describes itself as a ministry organization, rooted in Methodist heritage, with a mission "to provide opportunities for spiritual birth, growth and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting." Among other properties, Respondent owns the Boardwalk Pavilion in Ocean Grove, Neptune Township, New Jersey.

Complainants are a lesbian couple who reside in Ocean Grove, Neptune Township, New Jersey.

J. Frank Vespa-Papaleo is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION:

The investigation revealed sufficient evidence to support a reasonable suspicion that Respondent's refusal to permit Complainants to use its Boardwalk Pavilion for a civil union ceremony violated the public accommodation provisions of the LAD, and that enforcement of the LAD against Respondent does not violate the First Amendment to the U.S. Constitution.

The investigation disclosed that Respondent is a non-profit organization governed by a Board of Trustees. As provided by Respondent's charter, all of the Trustees must be members of the United Methodist Church; at least ten must be clergy and at least ten non-clergy. In addition, Respondent appoints Associate Trustees, who need not be members of the United Methodist Church, but may belong to any Christian denomination.

The investigation disclosed that Respondent owns all of the land, including the beach and boardwalk, in the section of Neptune Township, New Jersey known as Ocean Grove. Residential and non-residential buildings have been erected on some of the land; individuals and business entities own many of these buildings and lease the underlying land from Respondent. The investigation disclosed that Respondent owns and operates a number of facilities in Ocean Grove, including the Boardwalk Pavilion. Some of these, such as the Thornley Chapel, appear to operate as places of worship, and others such as the Great Auditorium, are used in part for secular and commercial purposes.[1] However, the

[1] For example, according to its website, in 2009 the Great Auditorium will be host to performances by the following performers: the New Jersey State Opera, Frankie Avalon, Bobby Rydell, The Oak Ridge Boys, and ABBA. Additionally, the Great Auditorium is the annual venue for the annual New Jersey Law

only facility at issue in this investigation is the Boardwalk Pavilion.

The investigation disclosed that the Boardwalk Pavilion is a rectangular open-sided structure covered by a roof. It contains fixed wooden benches facing a small raised area usable as a stage. The benches also face the beach and ocean.

The investigation disclosed that, beginning at least as early as 2002, Respondent permitted the public to reserve its Boardwalk Pavilion for exclusive use for events, mostly for weddings and occasionally for other events such as memorial services. The investigation disclose that in 2007, Respondent charged a uniform fee of $250 for use of the Pavilion, and usually collected either full payment or a portion of that fee as a deposit at the time a reservation was made. The investigation disclosed that Respondent used a printed "Facilities Use Request Form" to take reservations for events in any of nine different facilities, including the Boardwalk Pavilion. That form required users to disclose only the following information: date and time of requested use; name, address and phone number of person in charge of the event; name, address and telephone number of person making the request; type of event; and any set-up instructions or special needs. The investigation disclosed that, in granting approvals for use of the Pavilion for weddings, Respondent did not distinguish between religious or secular weddings, or between Christian weddings and religious weddings of other faiths.

The investigation disclosed that Respondent has permitted the Pavilion to be reserved for other secular events, including musical performances, university group meetings, fundraising events for secular non-profit organizations, and a civil war re-enactment. During the investigation, Respondent stated that it is a co-sponsor of all such events held in the Pavilion.

The investigation disclosed that, beginning at least as early as 2006, Respondent has reserved the Pavilion for a weekly religious service called "Pavilion Praise" on Sunday mornings during the months of June, July, August and September. The Pavilion Praise services are conducted by St. Paul's United Methodist Church of Ocean Grove. The investigation disclosed that Respondent used the Boardwalk Pavilion for Sunday afternoon vesper services for many decades, but at some point discontinued those services, and commenced the current Sunday Pavilion Praise services during the summer months. In addition, Respondent holds a Christian youth "breakfast club" in the Pavilion for an hour each weekday morning during the summer months, which includes bible discussion.

The investigation disclosed that, except when the Boardwalk Pavilion is reserved for exclusive use through Respondent, or is used by Respondent for its own programs and events, the Boardwalk Pavilion is open for general public use. Based on visits by Division staff on three different dates, as well as witness interviews, the investigation disclosed that,

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Enforcement Memorial Service, hosted by the New Jersey State Association of Chiefs of Police, at which the State Attorneys General have been the featured speaker.

at the time of the complaint and continuing to date, the Boardwalk Pavilion is used by the general public in a variety of ways, including as a place to sit, congregate, picnic, play and to seek shade and shelter from the weather. Signs posted in and on the Boardwalk Pavilion state that smoking, bicycling and skateboarding are prohibited. Other than those restrictions, there are no signs, postings or other visible indications that public use of the structure is prohibited in any way. Based on witness interviews and direct observation, the investigation concludes that, when Respondent was not using the Boardwalk Pavilion for scheduled programs, the casual passerby or user of the Ocean Grove beach or boardwalk would have no reason to conclude that the Boardwalk Pavilion is not open for the same general public use as the boardwalk itself or the uncovered benches situated along that boardwalk.

In addition, the investigation disclosed that Respondent affirmatively represented to the public and to State government that the Boardwalk Pavilion was open to the public. The investigation disclosed that in July 1989, Respondent applied to the New Jersey Department of Environmental Protection (NJDEP) for a Green Acres real property tax exemption for a number of its properties, including Lot 1, Block 1.01, on which the Boardwalk Pavilion is located. Its initial application stated that the Pavilion was "used for religious services and band concerts."

The investigation disclosed that, at a September 7, 1989 public hearing, Neptune Township opposed Respondent's application for a Green Acres tax exemption. The Township argued that the property would not benefit the general public, but instead would benefit only Respondent because its uses were restricted. In response, Respondent's representative argued that the Pavilion was generally open and accessible to the public through numerous boardwalk entrances, was used regularly for musical events, band practices and performances and other events including weddings, baptisms and memorial services, as well as religious services. He noted that 9000 people recently attended a radio station event in the Pavilion.

When asked whether the Pavilion is used by groups other than Respondent, Respondent's representative replied in the affirmative, giving examples such as the Ocean Grove Band, the Greek Orthodox Church, and parties holding weddings and memorial services. When asked whether they were all religious services, Respondent's representative replied that they probably were, but that was only because those were the types of people who sought to use it. He affirmatively stated that the Pavilion was not restricted to religious uses.

On September 15, 1989, NJDEP issued a determination approving Respondent's application for a Green Acres property tax exemption. NJDEP found, in pertinent part, "The lands in question will be open to the public on an equal basis," and that "The restrictions placed upon the public use of the property are found to be necessary for the proper maintenance and improvement of the land or because significant natural features may be adversely affected by unrestricted access."

The investigation disclosed that, every three years after the initial tax exemption, and most recently on or about March 2, 2007, Respondent applied to NJDEP for renewal of Green Acres tax exemptions it had previously received, including the exemption for the Boardwalk Pavilion. In completing NJDEP's recertification forms, Respondent wrote that, regarding the properties last designated as Green Acres tax exempt, "all segments [are] open to all public."

The investigation disclosed that on or about March 5, 2007, Harriet Bernstein and Luisa Paster (Complainants) applied to Respondent for permission to reserve the Boardwalk Pavilion for their civil union ceremony, to be held on September 30, 2007. The investigation disclosed that Respondent's president, Scott Rassmussen, decided to deny Complainants' request to use the Boardwalk Pavilion for their civil union ceremony, and Respondent informed Complainants of that decision on March 5, 2007. In a March 6, 2007 response to an email from Complainant Bernstein, Rassmussen explained that Respondent does not permit its facilities to be used for purposes that conflict with the clearly established policies of the United Methodist Church. He further explained that United Methodist Church policy "recognizes marriage only in terms of a covenant relationship between one man and one woman," and provides that civil union ceremonies "shall not be conducted by our ministers and shall not be conducted in our churches."

The investigation disclosed that on April 1, 2007, Rassmussen decided that Respondent would cease permitting the public to reserve use of the Boardwalk Pavilion for weddings and other events. On that day, Rassmussen directed Respondent's staff, including Respondent's volunteer wedding coordinator and newly hired Chief Administrative Officer, Scott Hoffman, to discontinue any future rentals of the Boardwalk Pavilion to the public for any purposes. The investigation further disclosed that, after Rassmussen made his decision, the question of whether Respondent would permit use of the Boardwalk Pavilion for weddings and other events in the future was presented to Respondent's governing body, its Board of Trustees. The investigation disclosed that the question was presented at the Board of Trustees' quarterly meeting in April 2007, but was tabled, and the Board of Trustees addressed it in a special meeting in June, 2007, at which time a majority of the Board voted to affirm Rassmussen's decision. The investigation disclosed that the Board of Trustees discussed the issue again in July, 2007, and at a special meeting in August 2007, the Board of Trustees re-affirmed, by majority vote, the decision to cease permitting use of the Boardwalk Pavilion for weddings and other events. One Trustee interviewed during the Division's investigation noted that the Trustees decided to cease permitting use of the Boardwalk Pavilion for weddings "until the issue is resolved." In a September 13, 2007 letter to the Commissioner of the New Jersey Department of Environmental Protection, Respondent's counsel similarly described the decision to cease permitting use of the Pavilion for weddings as "an interim policy."

During the investigation, Complainants presented evidence that Respondent continued to permit weddings to take place in the Pavilion after April 1, 2007. The investigation disclosed that Respondent permitted the Boardwalk Pavilion to be used for weddings that had been reserved prior its decision to cease permitting it to be used for

weddings. The investigation confirmed that, after April 1, 2007, Respondent granted no additional approvals for the Boardwalk Pavilion to be used for weddings, but several weddings took place in the Pavilion after Complainants' application was denied.[2] The investigation disclosed no evidence that Respondent made any public announcement explaining that weddings would no longer be permitted in the Pavilion. Thus, Complainants and others who observed weddings taking place might reasonably, but mistakenly, conclude that Respondent was continuing to accept new reservations for weddings to be held in the Pavilion.

The investigation disclosed that, after it decided to cease permitting the Boardwalk Pavilion to be used for weddings and other events, Respondent revised its Facilities Use Request Form to designate only the Bishop James Tabernacle, Thornley Chapel and the Youth Temple as facilities that could be reserved for wedding and event use. These facilities all appear to be churches. The investigation disclosed that, if and when applicants inquired about use of the Boardwalk Pavilion, Respondent's staff advised them that Respondent was no longer permitting it to be reserved for weddings.

In the fall of 2007, the New Jersey Department of Environmental Protection reviewed Respondent's application for renewal of its Green Acres tax exemptions, and by letter dated September 15, 2007, rejected that portion of Respondent's application that pertained to its Green Acres exemption for the Boardwalk Pavilion. The Green Acres decision was based on its conclusion that "the Pavilion is not open to all persons on an equal basis." That decision noted that the Green Acres statute and regulations establish equal access as a prerequisite to granting real property tax exemptions for privately owned land.

Although NJDEP revoked the Green Acres tax exemption for the Boardwalk Pavilion, NJDEP did not base this decision on Respondent's status as a religious organization, or the religious functions for which Respondent used the Pavilion. Instead, the ruling was based on the NJDEP's conclusion that, because Respondent denied use of the Pavilion for civil union ceremonies, the Pavilion "is not open to all persons on an equal basis."

ANALYSIS

At the conclusion of an investigation, the Division is required to make a determination as to whether "probable cause" exists to credit a complainant's allegations of discrimination. Probable cause has been described under the New Jersey Law Against

[2]Although Respondent is not currently permitting the Boardwalk Pavilion to be reserved for weddings or similar events, and thus, arguably, is no longer discriminating based on civil union status, the investigation disclosed that Respondent's suspension of Pavilion weddings is an "interim policy." As it is anticipated that Respondent would resume use of the Pavilion for weddings in the future, the import of this investigation is not limited to the brief period between Complainants' application and Respondent's decision to suspend use of the Pavilion for weddings.

Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert., den., 111 S. Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "Initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978); see also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

Here, the initial question to be addressed is whether Respondent's Boardwalk Pavilion is a public accommodation subject to the LAD.[3] The investigation disclosed sufficient evidence to support the conclusion that the Pavilion meets the LAD's definition of a public accommodation.

The LAD's definition of "public accommodation" is extremely broad. Thomas v. County of Camden, 386 N.J. Super. 582, 590 (App. Div. 2006). The examples delineated in the statute are illustrative of the types of places or accommodations covered, rather than an exhaustive list. See, e.g., Fraser v. Robin Dee Day Camp, 44 N.J. 480, 486 (1965) (Fact that day camps are not listed in the public accommodations enumerated in the statute is not evidence that the Legislature intended to exclude them from the scope of the LAD.) The LAD specifically lists boardwalks, seashore accommodations and meeting places as examples of public accommodations. N.J.S.A. 10:5-5(l). Aside from the illustrative examples, the LAD defines public accommodation by its exceptions--exempting places of accommodation that are distinctly private, as well as educational facilities operated or maintained by religious organizations. Ibid. Notably, there is no blanket exemption covering all types of facilities operated by religious organizations.

In Wazeerud-Din v. Goodwill Home and Missions, Inc., (App. Div. 1999), the Appellate Division addressed the question of whether a specific program operated by a religious society was a place of public accommodation subject to the LAD. In its analysis, the court evaluated the individual program (an addiction therapy program), rather than the religious organization that operated the program. Based on its finding that Goodwill Mission's addiction therapy employed Christian religious teaching and worship, the court concluded that the therapy program was not a public accommodation subject to the LAD. The court explicitly noted that it did not need to reach the question of whether other programs operated by that religious society were secular in nature, and for that reason might be considered public accommodations.

[3]Although Respondent asserted defenses in its Answer based on the real property provisions of the LAD, in a January 7, 2008 decision on Respondent's motion to dismiss, the DCR Director concluded that the public accommodation provisions, rather than the real property rental provisions, are applicable in this matter.

Following this guidance, the Division's investigation has evaluated the uses and functions of the Boardwalk Pavilion, rather than the nature of Respondent's organization, to determine whether the Boardwalk Pavilion is a public accommodation subject to the LAD. First, the investigation disclosed no evidence that the Boardwalk Pavilion limits its use to members or is otherwise "distinctly private."

Next, although Respondent at times uses the Boardwalk Pavilion for youth events that may include bible instruction, this is insufficient to define the Pavilion as an educational facility. Finally, although weekly religious services are held in the Pavilion during the summer months, the evidence and Respondent's own representations preclude defining the Pavilion as a church or place dedicated to worship.[4]

Instead, the observations of the Division's staff and witness interviews demonstrate that, except when an event is being held in the Pavilion, the Pavilion has functioned like the benches and boardwalk, and has been used by the general public for a variety of purposes consistent with its form and consistent with the general absence of any notices restricting its use. In addition, Respondent's own representations in connection with its applications for Green Acres tax exemptions, constitute a broad invitation to the public and demonstrate that Respondent's Boardwalk Pavilion is a public accommodation subject to the LAD.

As noted above, although Respondent disclosed to NJDEP in 1989 that the Pavilion was used for some religious purposes, Respondent affirmatively stated at that time that the Pavilion would be open to all persons on an equal basis. Respondent specifically stated that the reason it was used for religious events was because those were the types of people who requested to use it, and that the Pavilion was not restricted to religious uses. When Neptune Township objected to its tax exemption, arguing in part that the Pavilion was essentially restricted to Respondent's organizational uses, Respondent affirmatively argued to the contrary, explaining how the public would have use of the Pavilion.

The investigation disclosed that, by letter dated September 13, 2007, Respondent supplemented its March 2, 2007 Green Acres tax exemption renewal application. In that letter, Respondent addressed news articles suggesting that its refusal to permit use of the Boardwalk Pavilion for a civil union ceremony constituted a violation of Green Acres standards. Respondent argued that while the Pavilion continued to be open to the public for recreation and conservation purposes, Respondent had a right to prohibit uses that conflict with its religious principles. Respondent argued that the original Green Acres tax exemption was granted based on an understanding that Respondent "maintains and controls the use of the pavilion," and that Respondent's maintenance and control has always been in accordance with the religious objectives in its bylaws. Respondent went on to state,

[4]The fact that Respondent sought property tax exemption for the Boardwalk Pavilion pursuant to the open space protections of the Green Acres program, rather than as a building used for religious purposes pursuant to N.J.S.A. 54:4-3.6 or similar statutes, is additional evidence that the Pavilion is not a place of worship.

> The public has continuously enjoyed the...pavilion for "conservation and recreation purposes." At the same time, the Camp Meeting Association has maintained the right to insure that the pavilion is not used for purposes inconsistent with its religious principles.

Thus, even after the complaint was filed in this matter, Respondent continued to affirmatively represent that the Boardwalk Pavilion was open to the public for conservation and recreational uses consistent with its form and function as a sheltered seating area along a seaside boardwalk. Respondent noted that, because it maintains and controls a structure open to the public, its nature as a religious organization does not conflict with purposes of the Green Acres program.

Similarly, the fact that Respondent is a religious organization does not conflict with a finding that the Boardwalk Pavilion is a public accommodation as defined by the LAD. Although, as discussed below, the specific principles of Respondent's religion may be relevant in determining whether enforcement of the LAD in this case is prohibited by the First Amendment to the U.S. Constitution, neither Respondent's character as a religious organization nor the specific principles of Respondent's religion conflict with the conclusion that the Boardwalk Pavilion is a pubic accommodation.

Under the LAD, a public accommodation may not discriminate based on civil union status. In general, a public accommodation proprietor's admitted refusal to permit use of its facility for civil union ceremonies, while permitting it to be used for heterosexual weddings, would violate the LAD. However, Respondent argues that enforcing the LAD to prohibit it from discriminating based on civil union status would violate its rights under the First Amendment to the United States Constitution. The U.S. Supreme Court has held that First Amendment rights may in some cases prohibit enforcement of State laws prohibiting discrimination in public accommodations. See, e.g., Boy Scouts of America v. Dale, 530 U.S. 640, 656-657 (2000). Accordingly, the Division has considered Respondent's arguments on these issues.

A. Freedom of Expressive Association

The first of Respondent's constitutional arguments is that the Division's application of the LAD to the use of the Boardwalk Pavilion violates its First Amendment right to expressive association. Specifically, Respondent argues that if the law requires it to permit couples to use this facility for civil union ceremonies, it is unconstitutionally forcing Respondent to convey the false impression that it endorses such unions. Respondent relies on Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), to support its position that it has "a fundamental right to use its facilities to convey a message consistent with its ministry objectives." (District Court brief, p. 16). It maintains that its purpose is:

> ... to use its property to communicate messages consistent

> with its sincerely held religious beliefs – one of which is that marriage is a sacred institution ordained by God and exclusive to one man and one women. If the Association were compelled to use its places of worship to embrace "civil union" celebrations, it would be forced to associate with and endorse a message in support of these unions. (Id. at 17).

Fundamental to the Association's argument is its presumption that the Pavilion is a "place of worship," an argument that has expressly been rejected above. The question, then, is whether the principles enunciated in Hurley upon which Respondent relies apply to the owner of a place of public accommodation.

At issue in Hurley was whether a group of gay, lesbian and bisexual Irish-Americans had the right to march with an identifying banner in Boston's annual St. Patrick's Day parade. Years earlier the City of Boston had delegated the authority to operate the parade to the South Boston Allied War Veterans Council, an unincorporated association of individuals elected from various South Boston veterans groups. 515 U.S. at 560. Although the Veterans Council ran the parade with the imprimatur of the City, it was not a government entity. It refused to permit the Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc. ("GLIB") to participate in the parade, and GLIB sued the Council under the Massachusetts public accommodations law, which prohibits "any distinction, discrimination or restriction on account of...sexual orientation...relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." [Ibid.]

Considering the First Amendment rights of the parade organizer, the Supreme Court found that a parade can be distinguished from an ordinary walk by the expressive essence of its nature. "[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way." Id. at 568. This communication was protected by the First Amendment from interference by undue application of the Massachusetts civil rights law. Although GLIB also had a message to convey, and GLIB's message was also entitled to constitutional consideration, it was at odds with the message of the private organizers of the parade. "Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute [mandating that GLIB be included] produced an order essentially requiring petitioners to alter the expressive content of their parade." Id. at 572-573. Moreover, because the parade was not the only forum in which GLIB could get its message across – it also could have applied for a permit to hold its own parade, for example – its own constitutional right was not compromised by the group's exclusion from the Veterans Council's parade. Id. at 578.

The present situation is quite different. The Boardwalk Pavilion is not primarily used to convey a message. As described above, the Pavilion is put to a variety of uses, and they are not bound by the underlying conveyance of a united message. All members of the public are invited to travel through the pavilion, whether to rest, eat ice cream, engage in

private conversation or to pray. Until it stopped allowing couples to have wedding ceremonies performed there, the Pavilion was leased to couples of all faiths – or of no religious faith – and no regard was given to whether the person performing the ceremony did so by religious or secular authority. Based on its "open door" policy toward public use of the Pavilion, there is insufficient evidence to support the conclusion that Respondent was using the Pavilion to convey any message at all. Moreover, a civil union ceremony before invited guests, unlike the conduct of the GLIB marchers in Hurley, supra, itself conveys no message and is not expressive association. Accordingly, the application to conduct a legally authorized ceremony to memorialize the union of two people – regardless of their genders – cannot be seen as compromising the Association's right of expressive association.

B. Free Exercise of Religion

The Association has also argued that DCR's application of the LAD to its Boardwalk Pavilion violates its constitutionally protected right to free exercise of religion. In light of the many varied uses to which the Association permits the Pavilion to be used, this argument must also fail.

As discussed above, the Boardwalk Pavilion is not a place that is inherently dedicated to religious worship. Nowhere is the Association's acknowledgment of this fact more clear than in its applications – extending over a number of years – to receive Green Acres funding for the Pavilion. During its investigation, DCR has interviewed and obtained documents from staff at the Green Acres program, which is part of the New Jersey Department of Environmental Protection Green Acres program, the purpose of which is to encourage the dedication of privately-owned open space for public use. N.J.S.A. 54:4-3.63. Between 1989 and 2006 the Association renewed its application and was given Green Acres status, and attendant tax benefits, in large part because of its assertion that the Pavilion (and other designated Boardwalk property) was available to the general public.

The Boardwalk Pavilion, being admittedly available to the general public, may on occasion be used for religious practice, but at the time that the Complainants' application was made, that was not its exclusive purpose.

In its argument before the District Court in support of its petition for injunctive relief, the Association relied on Wazeerud-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3, 10 (App. Div. 1999), certif. den. 163 N.J. 13 (2000). At issue in Wazeerud-Din was a drug treatment facility and whether it was a place of public accommodation for the purposes of the LAD. The court held that the program in question was not, finding that it "is basically a program of religious teaching and worship and thus not a public accommodation. It is not a conventional drug treatment program because it does not provide medical treatment or secular psychological counseling. Rather, its essential premise is that drug addiction, alcoholism, compulsive gambling and sexual addictions are 'outward manifestations of inward sin' [as described by the clergyman running the program]." 325 N.J. Super. at 11. Thus, the facility was being used as a place of religious

worship and teaching for the purpose of assisting people with drug dependencies and other addictions to find spiritual help for their problems.

Being utilized for diverse reasons, the Pavilion, by contrast to the facility in Wazeerud-Din, is a place of public accommodation, and is not a religious facility. As such, when it invites the public at large to use it, the Association is subject to the Law Against Discrimination, and enforcement of that law in this context does not affect the Association's constitutionally protected right to free exercise of religion.

The LAD is a neutral, generally applicable law--it was not enacted with the goal of impacting religion. As such, the LAD can be enforced in a neutral manner as to all public accommodations, so long as its enforcement is rationally related to a legitimate governmental interest. United States v. Hardman, 297 F.3d 1116, 1126 (10th Cir. 2002). Here, it goes without saying that the LAD's fundamental goal of eradicating discrimination is a legitimate governmental interest. See, Fuchilla v. Layman, 109 N.J. 319, 334 (1988). Thus, any incidental burden on a particular religious belief or practice does not raise free exercise concerns.

Moreover, even if the facts of this case were to warrant a strict scrutiny analysis, the State's interest in protecting people from discrimination based on civil union status would justify the minimal impact of the LAD on Respondent.

Accordingly, given the strong evidence that the Association intentionally makes the Pavilion available for public use and does not dedicate it solely to the practice of religion, the LAD, a neutral law of general application, does not unconstitutionally impair the Association's right to the free exercise of religion.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

December 29, 2008
Date

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J. Frank Vespa-Papaleo, Esq., *Director*
New Jersey Division on Civil Rights

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: CRT 6145-09

HARRIET BERNSTEIN and **LUISA PASTER**; and **J. FRANK VESPA-PAPALEO**, Director, N.J. Division on Civil Rights,

COMPLAINANTS,

-vs-

OCEAN GROVE CAMP MEETING ASSOCIATION,

RESPONDENT.

RESPONDENT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DECISION

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PRELIMINARY STATEMENT

Complainants Harriet Bernstein and Luisa Paster asked the Ocean Grove Camp Meeting Association of the United Methodist Church (the "Association") to host their same-sex civil-union ceremony in its Boardwalk Pavilion (the "Pavilion"). The Association politely declined Complainants' request because that use of its worship facility would violate its sincerely held religious beliefs. Complainants, in turn, filed a complaint with the New Jersey Division on Civil Rights ("DCR"), alleging that the Association's refusal to host their ceremony constituted unlawful civil-union-status discrimination in violation of the New Jersey Law Against Discrimination ("LAD").

The Association files this Motion for Summary Decision, asking this tribunal to deny all Complainants' claims. As will be explained herein, Complainants' claims lack merit because (1) the LAD does not apply to the Association's operation of its Wedding Ministry in its worship Pavilion; (2) the Association's conduct did not constitute impermissible civil-union-status discrimination; (3) applying the LAD to force the Association to host Complainants' civil-union ceremony would violate the Association's rights of expressive association; (4) applying the LAD in this situation would amount to a compelled-speech violation; and (5) applying the LAD under these circumstances would violate the Association's free-exercise rights.

STATEMENT OF FACTS

A. The Founding of the Association

"In 1869 a small band of Methodist clergymen . . . capped a long search for an agreeable place to establish camp meeting grounds" by purchasing 260 acres (or one square-mile) of oceanfront property in New Jersey. *Schaad v. Ocean Grove Camp Meeting Ass'n*, 72 *N.J.* 237, 254 (1977), *rev'd on other grounds*, *State v. Celmer*, 80 *N.J.* 405 (1979); Rasmussen Cert. at ¶ 1

(R. Ex. 1). Shortly after arriving, these clergymen created the Association, which, as expressed in its original Act of Incorporation, exists "for the purpose of providing and maintaining for the members and friends of the Methodist Episcopal Church a proper, convenient and desirable permanent camp meeting ground and [C]hristian seaside resort." Act of Incorporation at ¶ 1 (1870) (R. Ex. 3). Indeed, as the Association's first President Dr. Ellwood H. Stokes said, the object of the Association "is preeminently *Religious*." Morris S. Daniels, The Story of Ocean Grove at 35 (1919) (R. Ex. 5).

The Association's founding was part of the National Holiness Camp Meeting movement. Daniels, The Story of Ocean Grove at 24 (R. Ex. 5). Camp-meeting organizations, such as the Association, "exist for the purpose of providing religious bodies or societies with . . . places for religious services." *Schaad, supra*, 72 *N.J.* at 270 (Sullivan, J., concurring); Rasmussen Cert. at ¶ 4 (R. Ex. 1). The Association has thus convened a camp meeting every summer since 1870. *Id.* at ¶ 5; Daniels, The Story of Ocean Grove at 24 (R. Ex. 5). Camp meetings are focused, religious, revival gatherings, which involve, among other things, daily preaching, prayer, and worship. Richard E. Brewer, Perspectives on Ocean Grove at 4-5 (1969) (R. Ex. 6); Rasmussen Cert. at ¶ 6 (R. Ex. 1).

From its very beginning, as shown in its founding documents, the Association consecrated its land to "sacred uses" for "high and holy purposes," and its founders "enjoin[ed] [the] strict observance" of these principles "upon those who may succeed" them. *See* Preamble to the Act of Incorporation at 1 (1870) (R. Ex. 8). The Association likewise dedicated its facilities "to be used for [God's] glory" and declared that it would not use those facilities in a manner "inconsistent with the doctrines, discipline, or usages of the Methodist Episcopal Church." Daniels, The Story of Ocean Grove at 59 (R. Ex. 5); Rasmussen Cert. at ¶ 8 (R. Ex. 1).

B. The Association Remains a Religious Organization

Today, more than 140 years after its founding, the Association remains focused on its purpose of providing a place dedicated to the worship and study of Jesus Christ. Rasmussen Cert. at ¶ 9 (R. Ex. 1). Indeed, the Association's bylaws confirm that it retains the same purpose stated in the original Act of Incorporation. Bylaws at 1 (R. Ex. 13). And its mission, as consistently reiterated throughout its organizational documents, is "to provide opportunities for spiritual birth, growth, and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting." Rasmussen Cert. at ¶ 11 (R. Ex. 1). In line with this mission and purpose, the Association continues to be classified as a nonprofit organization exempt from federal income tax. *Id.* at ¶ 12.

The Association also continues to own all the land in the Ocean Grove community. Rasmussen Cert. at ¶ 13 (R. Ex. 1). While the Association leases some portions of the land as residential property to home owners (for a nominal fee) and as commercial property to business owners, it maintains direct control over significant portions of its property and many of its facilities to further its Christian mission through its programs and activities. *Id.* at ¶ 14.

In 1979, the New Jersey Supreme Court declared that "the Ocean Grove Camp Meeting Association of the United Methodist Church is first and foremost a religious organization." *State v. Celmer*, 80 *N.J.* 405, 416 (1979). It correctly observed that "[s]uch a state of affairs is not only evident from its name, but also from the purposes underlying its formation, its internal governmental structure, and the various activities which it undertakes." *Ibid.*

The Association's organizational structure confirms that it is a religious organization, composed exclusively of religious leaders. The Association is governed by a Board of Trustees, which begins every meeting with religious "devotional exercises" and closes with prayer.

Bylaws at 1, 3 (R. Ex. 13). Every voting trustee must be a member of the United Methodist Church, and at least ten of those trustees must be clergy of that denomination. *Id.* at 1. Each (non-voting) associate trustee, while he or she need not be from the United Methodist Church, must "be a member of a Christian Church in good and regular standing." *Id.* at 2. The trustees annually elect from their own voting members the officers and committee chairpersons who run the Association. *Id.* at 5; *see also Schaad, supra*, 72 *N.J.* at 279 (Pashman, J., concurring and dissenting).

In addition to its religious leaders, the Association operates primarily through the employment of and volunteer assistance provided by professing Christians. Rasmussen Cert. at ¶ 21 (R. Ex. 1). The Association requires that certain ministry-related volunteers and employees provide a statement of their Christian faith. *Id.* at ¶ 22. The Association relies on its hundreds of volunteers and the thousands of hours they donate each year to operate its many programs and ministries. *Id.* at ¶ 23.

The Association's programs and activities, which mostly occur during the summer months, also leave no doubt regarding its religious purpose and mission. Its activities primarily consist of programs designed to help draw people closer to Jesus Christ. Rasmussen Cert. at ¶ 27 (R. Ex. 1). For instance, the Association conducts the following overtly religious activities: (1) Sunday worship services, *see* 2008 Calendar of Events at 3-5 (R. Ex. 7); (2) a "Bible hour" every weekday providing Biblical teaching for adults, *id.* at 6-7; (3) multiple programs every weekday providing Biblical teaching for children and youth of all ages, *id.* at 9; (4) almost daily gospel-music programs, *id.* at 11; (5) a camp-meeting week, which, as mentioned above, is a spiritual revival event, *id.* at 8; and (6) periodic educational seminars teaching Biblical principles about myriad topics, *see* Rasmussen Cert. at ¶ 28 (R. Ex. 1). The Association conducts these religious

programs in many of its facilities, including, but not limited to, the Great Auditorium, Bishop Janes Tabernacle, Thornley Chapel, the Youth Temple, and the Pavilion. *Id.* at ¶ 29.

In all that it does, the Association is acutely concerned with Christian evangelism, which fits squarely within its mission-statement charge to provide opportunities for "spiritual birth." Rasmussen Cert. at ¶ 30 (R. Ex. 1). Evangelism is a term encompassing conduct that encourages people to begin or revive personal relationships with and commitments to Jesus Christ. *Id.* at ¶ 31; *see also* Merriam-Webster Online Dictionary, *available at* http://www.merriam-webster.com/dictionary/evangelism (last visited July 22, 2010). The Association's programs and activities seek to further this goal of evangelism, either by reaching out directly to the public with the love and Gospel message of Jesus Christ or by inviting the public to other events that will expressly proclaim that message. Rasmussen Cert. at ¶ 32 (R. Ex. 1).

This evangelistic purpose motivates even the activities and programs that are not overtly religious, such as the Association's classical concerts and Saturday-night family entertainment. Rasmussen Cert. at ¶ 34 (R. Ex. 1). Through these events, the Association connects with people who might not attend its worship services and encourages them to attend those services in the future. *Id.* at ¶ 35. For example, the Association begins its Saturday-night family-entertainment events with a brief prayer and typically a quick promotion of its upcoming religious services and events. *Id.* at ¶ 36. These are just some of the diverse ways that the Association strives, in all its programs, to reach the entire community with the love and Gospel message of Jesus Christ. *Id.* at ¶ 37. These creative outreach activities are consistent with the Association's Wesleyan tradition of reaching out to the entire community, rather than waiting for people to attend church in a traditional setting. *Id.* at ¶ 38.

C. The Association's Use of the Pavilion

The Pavilion is a wood-framed, open-air structure overlooking the Atlantic Ocean. Rasmussen Cert. at ¶ 41 (R. Ex. 1). The Pavilion and its predecessor structures have regularly housed worship services for the Association since the 1880s. *Id.* at ¶ 42; *see also* Daniels, The Story of Ocean Grove at 82, 85 (R. Ex. 5). The currently standing Pavilion has existed since the 1940s, and it has regularly housed worship services since that time. Rasmussen Cert. at ¶ 43 (R. Ex. 1). Due to the Pavilion's open-air nature and thus its accessibility to anyone passing by, these worship services have been an important part of the Association's evangelistic outreach to the community. *Id.* at ¶ 44.

Still today, the Pavilion remains one of the Association's places of worship and a vibrant component of its religious mission. Rasmussen Cert. at ¶ 45 (R. Ex. 1). The Association holds the following overtly religious events in the Pavilion each summer: (1) Pavilion Praise, which is a Sunday morning contemporary worship service that hosts approximately 450 people each week (and leads some visitors to salvation in Jesus Christ nearly every week), *see id.* at ¶ 46; Pavilion Praise Pictures (R. Ex. 17); (2) the Breakfast Club, which is a daily program held Monday through Friday mornings that provides Biblical teaching for middle- and high-school students, *see* Rasmussen Cert. at ¶ 46 (R. Ex. 1); (3) Gospel Music Ministries, which are almost daily "evangelistic services" presenting "the Gospel message of salvation" in Christ through music and preaching, *see ibid.*; 2008 Calendar of Events at 11 (R. Ex. 7); and (4) numerous camp-meeting events each summer, *see* Rasmussen Cert. at ¶ 46 (R. Ex. 1). Between 2002 and 2006, these programs accounted for approximately 75% of the Pavilion's total usage. *Id.* at ¶ 47; Boardwalk Pavilion Usage Summary at 1 (R. Ex. 18). And since at least 2002, the Association has posted signs on the Pavilion advertising these (and other) religious services and programs to encourage

the public to attend those events. Rasmussen Cert. at ¶ 48 (R. Ex. 1); *see also* Pavilion Sign Pictures at 1-8, 10-13 (R. Ex. 19).

The Association also uses the Pavilion for its Summer Band Concert series, which, between 2002 and 2006, accounted for approximately 8% of the Pavilion's total usage. Rasmussen Cert. at ¶ 50 (R. Ex. 1). While these concerts are not necessarily religious in content, the Association holds these free-of-charge events to further its evangelistic mission by drawing people to its facilities, enabling its staff to build relationships with them, and hoping that the attendees might see the many posted signs advertising the Association's worship services and religious events and that they might be encouraged to attend those events. *Id.* at ¶ 51.

Additionally, before April 2007, even though the vast majority of events in the Pavilion were the Association's own worship services, events, and programs, the Association occasionally co-sponsored or supported events or meetings held by community, charitable, or religious organizations. Rasmussen Cert. at ¶ 52 (R. Ex. 1). Between 2002 and 2006, these events constituted a mere 3% of the Pavilion's total usage. *Id.* at ¶ 53. The Association preapproved all these events and did not charge the organizations a fee to use the Pavilion. *Id.* at ¶ 54. The Association wanted to support and promote all these events, and none conflicted with its religious faith, beliefs, or principles. *Id.* at ¶ 55. As with the Summer Band Concert series, these events were evangelistic efforts enabling the Association to build relationships with persons and organizations in the community, which, in turn, allowed the Association to share the love and message of Jesus Christ with them. *Id.* at ¶ 56.

When the Association is not using the Pavilion for events or programs, it permits the public to access the Pavilion to sit, rest, enjoy the scenery, or avoid the sun or rain. Rasmussen Cert. at ¶ 57 (R. Ex. 1). Again, the Association permits this public access as a means of

evangelism, hoping that its generosity with its idyllic, seaside real estate will display the love of Jesus Christ, and that the visitors to the Pavilion will see the posted signs and be encouraged to attend the Association's worship services or religious events. *Id.* at ¶ 58. The Association, however, has never permitted a use of the Pavilion that directly conflicts with its religious faith, beliefs, or principles, and the public at all times must abide by the Association's rules and restrictions. *Id.* at ¶ 59.

D. The Association's Wedding Ministry

The Association has operated a Wedding Ministry since about 1997. Rasmussen Cert. at ¶ 61 (R. Ex. 1). Through this ministry, the Association originally hosted wedding ceremonies in Thornely Chapel, Bishop Janes Tabernacle, the Youth Temple, and the Pavilion. *Id.* at ¶ 62. The Association has created a page on its website discussing its Wedding Ministry. *Id.* at ¶ 63; Wedding Website Page at 1-2 (R. Ex. 22). The day-to-day operation of this ministry is assigned to the Wedding Committee, which is staffed by unpaid volunteers. Rasmussen Cert. at ¶ 64 (R. Ex. 1). At least one volunteer wedding coordinator from that committee attends and maintains supervision over every wedding and wedding rehearsal hosted in the Association's facilities. *Id.* at ¶ 65. Between 2002 and 2006, weddings and wedding rehearsals under the Association's Wedding Ministry accounted for roughly 11% of the Pavilion's total usage. *Id.* at ¶ 66.

The Wedding Ministry has many purposes. First, it is another means of evangelism for the Association. Rasmussen Cert. at ¶ 67 (R. Ex. 1). The Wedding-Committee coordinator is able to interact with the couple and their families, which, in turn, creates an opportunity for the coordinator to share the love of Jesus Christ. *Id.* at ¶ 68. Additionally, some couples ask the Wedding Committee to provide or recommend a minister for their ceremony, and the Committee typically recommends a United Methodist minister affiliated with the Association or one of the

ministers on the Association's staff or Board. *Id.* at ¶ 69. This provides additional outreach opportunities by fostering direct interaction between the couple and a United Methodist minister. *Ibid.*

Second, through the Wedding Ministry, the Association seeks to promote and communicate the message inherent in every wedding ceremony. Rasmussen Cert. at ¶ 70 (R. Ex. 1). According to the Association's sincerely held religious beliefs, which are based on its interpretation of the Holy Bible and its reading of the Book of Discipline of the United Methodist Church, marriage is the uniting of one man and one woman. *Id.* at ¶ 72; *see also* Ephesians 5:22-33; Book of Discipline at ¶161(C) (2004).[1] Thus, every wedding ceremony between one man and one woman, regardless of whether it expressly proclaims a particular religious doctrine, communicates this Biblical understanding of marriage. Rasmussen Cert. at ¶ 73 (R. Ex. 1). That is a message the Association wants to support and communicate through its Wedding Ministry. *Id.* at ¶ 74. This purpose is particularly salient for weddings held in the open-air Pavilion, which can be seen by all who pass by the Pavilion. *Ibid.*

Third, by allowing its facilities to be used for wedding ceremonies, which fulfill the legal solemnization requirement for entering a marriage in New Jersey, the Association wants to support marriage as a vital and effective social institution, important for, among other things, promoting the best interests of children. Rasmussen Cert. at ¶ 75 (R. Ex. 1).

The Wedding Committee provides extensive wedding-related assistance to the marrying couples, including wedding-coordination assistance, on-site rehearsal and wedding-day assistance by a volunteer wedding coordinator, assistance in locating a minister, a photographer,

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[1] The relevant statements from each cited portion of the Book of Discipline are quoted in the attached Certification of Scott Rasmussen.

or a reception venue, and assistance in setting up the Pavilion. Rasmussen Cert. at ¶ 76. Offering such far-ranging assistance to the couples is part of the Association's efforts to fulfill the Biblical commandment of serving others. *Id.* at ¶ 77. Plus, this assistance fosters discussion and interaction between the Wedding Committee and the couple, thereby furthering the Association's evangelistic purposes. *Id.* at ¶ 78.

The Association does not refuse to host weddings for persons from non-Christian religions or denominations; nor does the Association give a preference to persons who share its religious beliefs. Rasmussen Cert. at ¶ 79 (R. Ex. 1). Doing so would undermine the Wedding Ministry's evangelical purpose because it would hinder the Association's efforts to reach out to persons of different religious faiths. *Id.* at ¶ 80.

Even though the Wedding Ministry is a nonprofit, outreach endeavor, the Association typically charges a small fee to host each wedding. Rasmussen Cert. at ¶ 81 (R. Ex. 1). The fee was initially implemented in 1997, and at that time, it was only $150; a year later, it was raised to $250 (which included a deposit of $75). *Id.* at ¶ 82. But the Association sometimes accepts a lesser amount; for instance, on some occasions it has accepted only $75, $150, $200, or even waived the fee entirely. *Id.* at ¶ 83; *see, e.g.*, Facilities-Use-Request Forms (R. Ex. 23).

The Association's fee is *far* below fair-market value for a wedding-ceremony venue. Rasmussen Cert. at ¶ 84 (R. Ex. 1). The average cost of renting a ceremony location in Monmouth County, New Jersey—where the Association is located—is $2,846 per wedding. Monmouth County Wedding Costs at 1-2 (R. Ex. 24). The Association's $250 fee is approximately 9% of that fair-market value. This percentage is even smaller when considering the additional wedding assistance that the Wedding Committee provides. For instance, the average cost for a day-of wedding coordinator, which is just one aspect of the assistance

provided by the Wedding Committee, is $1,428 in Monmouth County. *Ibid.* Thus, the fair market value of everything provided by the Association is at least $4,274, and its $250 fee is a mere 6% of that figure.

The purpose of the fee is to raise funds to pay for the upkeep and maintenance costs of the Association's facilities, including the Pavilion, and any excess funds help cover the costs of the Association's ministries, including the Wedding Ministry. Rasmussen Cert. at ¶ 85 (R. Ex. 1). The last eight full years that the Association hosted weddings in the Pavilion, between 1999 and 2006, it collected an average of $2,613 per year for hosting weddings in that facility. *Id.* at ¶ 86; Income Statement at 1-2 (R. Ex. 25). And during that same time, the yearly maintenance costs and expenses for the Pavilion alone averaged $1,350, which is more than half the money collected for hosting weddings there. Rasmussen Cert. at ¶ 87 (R. Ex. 1); Income Statement at 1-2 (R. Ex. 25). Additionally, operating the Wedding Ministry involves many miscellaneous costs, such as time spent by hourly workers on administrative tasks connected with that ministry, costs of supplies used by the Wedding Committee volunteers, and other difficult-to-quantify administrative costs. Rasmussen Cert. at ¶ 88 (R. Ex. 1). Taking into account the miscellaneous costs associated with the Wedding Ministry, it is clear that the funds collected through that ministry (especially considering that the Association has an annual operating budget of more than $3.7 million) do not accomplish much more than covering maintenance and upkeep costs on the facilities used for weddings. *Id.* at ¶¶ 89-90.

E. The Association's Green-Acres Tax Exemption

In July 1989, the Association applied to the New Jersey Department of Environmental Protection ("DEP") for a Green-Acres real-property tax exemption for its beachfront property, which included its beach, its boardwalk, and a beachfront grass area (where the Pavilion is

located). *See* Green-Acres Application (R. Ex. 26). The purpose of the Green-Acres program is to preserve "natural open space areas for public recreation and conservation purposes," *see N.J.S.A.* 54:4-3.63; thus, to be eligible for the exemption, property must be "open for public use on an equal basis" for recreational and conservation purposes, *see N.J.A.C.* 7:35-1.4(a)(2); *N.J.A.C.* 7:35-1.2.

The Association sought the exemption for the Pavilion because that facility is open to the public on an equal basis for the recreational purposes of sitting, resting, conversing, enjoying the scenery, or avoiding the sun or rain. Rasmussen Cert. at ¶ 93 (R. Ex. 1). But in its Green-Acres application, the Association made it clear that it "maintains and controls the use of the [P]avilion." Green-Acres Application at Attachment ¶ 6d (R. Ex. 26). The Association also described the then-occurring uses of the Pavilion, which included religious services, gospel concerts, band concerts, weddings, and baptisms. *Ibid.*

In August 1989, the Township of Neptune—the municipality where the Pavilion is located—objected to the Association's Green-Acres application. August 1989 Neptune Letter at 1-2 (R. Ex. 27). So in September 1989, the Green-Acres Office held a public hearing regarding the matter. Public-Hearing Minutes at 1 (R. Ex. 28). The minutes from the public hearing reflect that the Association's representative, Phillip Herr, stated that the "[P]avilion is open and access is gained through numerous entrances from the boardwalk." *Id.* at 2. That statement is consistent with the Association's willingness to allow the public to enter the Pavilion for the recreational purposes of sitting, resting, conversing, enjoying the scenery, or avoiding the sun or rain. Rasmussen Cert. at ¶ 98 (R. Ex. 1). And the minutes also reflect that Mr. Herr reiterated what was written in the application: that the Pavilion is used for "religious services," "musical

events," "weddings, memorial services, [and] baptisms[.]" Public-Hearing Minutes at 2 (R. Ex. 28).

According to the minutes, Mr. Herr also said that the Association allows other organizations to use the Pavilion, citing as examples religious groups such as the Greek Orthodox Church and local community groups such as a radio station. Public-Hearing Minutes at 2, 5 (R. Ex. at 28). The minutes also indicate Mr. Herr's acknowledgement that the Association does not restrict use of the Pavilion only to religious events or services. *Id.* at 5. Notably, none of the statements attributed to Mr. Herr contradicts or undermines the use of the Pavilion as outlined in this Statement of Facts. And according to the Green-Acres public record, nowhere did the Association represent that the Pavilion is open for any *uses* or *activities* in which the public might want to engage. Such a statement, of course, would have directly contradicted the Association's representation that it "maintains and controls the use of the [P]avilion." *See* Green-Acres Application at Attachment ¶ 6d (R. Ex. 26).

Later in September 1989, the DEP granted the Green-Acres exemption to the Association for nearly all property in its application including the Pavilion. Green-Acres Approval Letter at 1-2 (R. Ex. 29). The Association kept that exemption until September 2007, when the DEP, after learning of the incidents giving rise to this case, revoked the Green-Acres exemption for the portion of the property on which the Pavilion sits. Green-Acres Revocation Letter at 1-2 (R. Ex. 30). But the Monmouth County Board of Taxation refused to impose rollback taxes for that portion of the Association's property. Rasmussen Cert. at ¶ 101 (R. Ex. 1). And to this day, the Association continues to receive the Green-Acres exemption for all other property approved in its original application. *Id.* at ¶ 102.

Shortly after the DEP revoked the Green-Acres exemption for the Pavilion lot, the Association applied for and received a real-property tax exemption for that lot as "church and charitable property" because it is owned by a religious organization and, as a place of worship, is actually and exclusively used in its work. Rasmussen Cert. at ¶ 104 (R. Ex. 1); Pavilion Property Classification at 1 (R. Ex. 33).

F. The Association's Religious Views on Marriage, Same-Sex Unions, and Homosexual Behavior

The Association sincerely believes, based on its interpretation of the Holy Bible and its reading of the Book of Discipline, that marriage is the uniting of one man and one woman. Rasmussen Cert. at ¶ 72 (R. Ex. 1); *see also* Ephesians 5:22-33; Book of Discipline at ¶ 161(C). This marital union represents the loving and committed relationship between Jesus Christ and His Church. Rasmussen Cert. at ¶ 105 (R. Ex. 1); *see also* Ephesians 5:22-33. The Association also believes that marriage between one man and one woman is the only sacred romantic union approved by the Bible. Rasmussen Cert. at ¶ 106 (R. Ex. 1). The Association openly preaches these religious beliefs about marriage. *Id.* at ¶ 107.

The Association also believes that marriage between one man and one woman is a vital social institution, and that marriage's role in society serves, among other things, as public confirmation of the complementary roles of the sexes and the importance of providing both fathers and mothers for all children. Rasmussen Cert. at ¶ 108 (R. Ex. 1).

In contrast, the Association sincerely believes that the "practice of homosexuality" is incompatible with Christian teaching, and thus it does not condone that practice. Rasmussen Cert. at ¶ 109 (R. Ex. 1); *see also* Romans 1:26-27; Book of Discipline at ¶161(G). As a result of this, and because of its belief that marriage is the only sacred romantic union, the Association sincerely believes that, to adhere to its Biblical principles and its reading of the Book of

Discipline, it cannot allow same-sex civil-union ceremonies in the facilities that it uses for worship services. Rasmussen Cert. at ¶ 110 (R. Ex. 1); *see also* Book of Discipline at ¶341(6). Additionally, the Association does not want to promote homosexual conduct as appropriate behavior; nor does it want to support same-sex unions as morally legitimate unions. Rasmussen Cert. at ¶¶ 111-12 (R. Ex. 1).

Nevertheless, the Association fervently believes that persons who identify as homosexual are of sacred worth, deeply loved by Jesus Christ, and, like all other persons, in need of a relationship with God. Rasmussen Cert. at ¶ 113 (R. Ex. 1); *see also* Book of Discipline at ¶161(G). The Association thus welcomes and encourages all persons—including those who identify as homosexual—to attend its worship services and ministry-related events. Rasmussen Cert. at ¶ 114 (R. Ex. 1); *see also* Book of Discipline at ¶161(G).

G. Complainants' Request to Hold a Civil-Union Ceremony in the Pavilion

In early March 2007, Complainant Bernstein asked the Association if she could use the Pavilion for a civil-union ceremony with her partner, Complainant Paster. Rasmussen Cert. at ¶ 116 (R. Ex. 1). Ms. Bernstein submitted the $75 deposit that accompanies a request to reserve a facility under the Association's Wedding Ministry. *Id.* at ¶ 117. The Association denied that request and returned the deposit because that particular use of the facility would violate its sincerely held religious beliefs. *Id.* at ¶ 118. Then on March 5, 2007, Ms. Bernstein sent an email to the Association's President Scott Rasmussen, asking him to take her request to the Board of Trustees for consideration. March 2007 Emails at 1-2 (R. Ex. 35). In response, Mr. Rasmussen said that the Association was "unable to accommodate [that] request" because it does "not permit uses [of the Pavilion] that conflict with the clearly established policies of [its]

denomination." *Id.* at 1. But Mr. Rasmussen invited Complainants "to participate fully in the ministries and programs of [the Association]." *Ibid.*

Complainants nevertheless persisted in their efforts to use the Pavilion for their civil-union ceremony. On March 11, 2007, they and a few other Ocean-Grove residents sent a letter asking the Association to allow civil-union ceremonies in its facilities. March 2007 Letter at 1 (R. Ex. 36). And later, Complainants and some other Ocean-Grove residents formed a group called Ocean Grove United, which, among other things, insists that the Association must host civil-union ceremonies in the Pavilion. Rasmussen Cert. at ¶ 122 (R. Ex. 1); *see also* http://www.oceangroveunited.org/.[2]

Complainants' persistence about this civil-union issue prompted the Association to alter its ministries. Rasmussen Cert. at ¶ 125 (R. Ex. 1). On April 1, 2007, Mr. Rasmussen decided that the Association would no longer host weddings in the Pavilion. *Id.* at ¶ 126. Then on April 29, 2007, Mr. Rasmussen formally established a policy prohibiting any outside individuals or organizations from reserving the Pavilion for any purpose. *Id.* at ¶ 127. He implemented these policy changes because of the fear that, as a result of Complainants' request, the government would improperly apply the LAD to force the Association to host civil-union ceremonies in its

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[2] This insistence conflicts with Ms. Bernstein's previously acknowledged understanding of the Association's rules and purpose. Ten years earlier when Ms. Bernstein purchased a house on land owned by the Association, she acknowledged her understanding of the Association's rules and regulations, which stated that "[t]he Association reserves the right . . . to withdraw th[e] privilege" of using its publicly accessible premises for "conduct [that] is not generally considered compatible with the interest or purposes of the Association." Bernstein's Property Application at 2, 6 (R. Ex. 37). At that time, she also acknowledged that she was "in full sympathy with the purpose of the . . . Association, that being to provide and maintain for Methodists and their friends a proper, convenient and desirable permanent Camp Meeting Ground and Christian Seaside Resort." *Id.* at 2.

Pavilion in violation of its religious tenets and constitutional rights. *Id.* at ¶ 128. The Association's Board of Trustees later ratified these policy changes. *Id.* at ¶ 129.

Notwithstanding these fear-impelled policy changes, the Association wants to be free to use the Pavilion consistently with its religious mission. Rasmussen Cert. at ¶ 130 (R. Ex. 1). It thus would like to have the right to resume operating its Wedding Ministry in the Pavilion, and it also desires to begin once again co-sponsoring and supporting events by community, charitable, and religious organizations in that facility. *Id.* at ¶ 131. If, however, the DCR were to require the Association to host Complainants' ceremony, the Association would feel pressured to speak out against that ceremony and the messages conveyed therein. *Id.* at ¶ 132. But even though the Association does not support same-sex unions or homosexual conduct, it does not want to be forced to speak out specifically and actively against civil-union ceremonies. *Id.* at ¶ 133. The Association believes that if it is forced to speak against civil-union ceremonies, it might unnecessarily alienate some people in the community who it is trying to reach with the Gospel message. *Id.* at ¶ 134.

H. Complainants' Civil-Union Ceremony

On September 30, 2007, Complainants legally entered into a civil union under the laws of the State of New Jersey. Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 1 (R. Ex. 41); Civil-Union Certificate (R. Ex. 42). That same day, they held their civil-union ceremony on a fishing pier in Ocean Grove. *See* Civil-Union Invitation (R. Ex. 43); Civil-Union Pictures (R. Ex. 44). Complainants invited their friends and family members to attend that ceremony because "they wanted to share their happiness" with those close to them. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 2 (R. Ex. 45). Approximately 80 of their friends and family members

attended. *Id.* at No. 1. Complainants used a microphone during their ceremony. *See* Civil-Union Pictures at 5-6, 9 (R. Ex. 44).

Complainants held their ceremony under a canopy called a Chuppah, which is "a traditional element of Jewish marriage ceremonies [that] signifies the beginning of a new household for the couple." Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 11 (R. Ex. 45); *see also* Civil-Union Pictures at 1, 3-4, 11 (R. Ex. 44). Three officiants presided over Complainants' ceremony: Rabbi Al Landsberg; Town of Neptune Deputy Mayor Randy Bishop; and the couple's friend Tom Pivinski. Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 5 (R. Ex. 41); Civil-Union Program at 2 (R. Ex. 46).

Mr. Pivinski began the ceremony by welcoming the guests and sharing a quick spiritual message, which, among other things, included the following:

> This is a holy moment. God's spirit infuses it with value and integrity and truth. God's spirit has shown Harriet and Luisa the way to each other and has set their hearts afire for one another.

Pivinski Email at 2 (R. Ex. 47). Then Rabbi Landsberg offered an introductory prayer of blessing. Civil-Union Program at 2 (R. Ex. 46); Ceremony Agenda at 1 (R. Ex. 48). He also explained the significance of the Chuppah to the guests and blessed a cup of grape juice with a traditional Jewish prayer (known as the Kiddish) before giving it to the couple to drink. *Id.* at 1; Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 10 (R. Ex. 45); Civil-Union Pictures at 2, 4 (R. Ex. 44).

The couple then engaged in a braiding ritual that they created for their ceremony, and while performing that ritual, they said:

> These three ribbons hanging here represent three aspects of our lives—the blue is the sea and sky, the lavender is the traditional lesbian color, and the white, of course[,] is for weddings and hope for the future. We are braiding them now to

> create a bond stronger and more beautiful than each part alone. May our lives be ever intertwined, our love keeping us together.

Ceremony Agenda at 1 (R. Ex. 48). Next, the couple exchanged vows that they had written for each other, and after that, they exchanged rings and jointly stated in part:

> We pledge to each other to be loving friends and partners in marriage. . . . *Hare at mekudeshet li betaba' at zo k'dat Moshe v' Yisrael.* Behold, thou art consecrated to me with this ring, according to the law of Moses and Israel.

Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 8 (R. Ex. 41); Vows at 1-2 (R. Ex. 49). Mr. Bishop then gave the legal pronouncement. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 5 (R. Ex. 45); Civil-Union Program at 2 (R. Ex. 46).

Next Rabbi Landsberg read the contents of the Ketubah, which is a Jewish wedding certificate. Ceremony Agenda at 2 (R. Ex. 48); Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 4 (R. Ex. 45); Ketubah Photos at 1-4 (R. Ex. 50). He stated in part:

> Harriet Bernstein and Luisa Paster did hereby declare themselves to be married each to the other . . . . Accordingly, let it be promulgated to all those that will hear, that Harriet and Luisa have pledged to each other an exclusivity called marriage, and have embraced as friends, as lovers, and as unwavering companions.

Id. at 1-3. Rabbi Landsberg then explained to the guests and led the couple in the traditional Jewish-wedding breaking-of-the-glass custom. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 9 (R. Ex. 45); Ceremony Agenda at 2 (R. Ex. 48); Civil-Union Pictures at 12 (R. Ex. 44). And finally, the couple kissed and embraced at the conclusion of the ceremony. Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 6 (R. Ex. 45); Civil-Union Pictures at 13 (R. Ex. 44).

PROCEDURAL HISTORY

In June 2007, Complainants filed a discrimination complaint with the DCR, alleging that the Association's denial of their request to host their civil-union ceremony in the Pavilion

amounts to unlawful public-accommodation discrimination on the basis of civil-union status. The Association filed a motion to dismiss that complaint, contending that the LAD does not apply under these circumstances and that, in any event, this application of the LAD would violate its constitutional rights. In January 2008, however, the DCR denied that motion largely because, the DCR claimed, it needed more evidence to evaluate the Association's arguments. In December 2008, the DCR, relying on incomplete facts and flawed legal analysis, issued a Finding of Probable Cause that the Association engaged in unlawful discrimination. But in this brief, the Association will highlight the DCR's errors and show that Complainants' claims lack merit.

LEGAL ARGUMENT

I. Under the Circumstances of this Case, the Pavilion Is Not a Public Accommodation, But a Place of Religious Worship Used for Ministry by a Religious Organization.

Complainants allege that the Pavilion is a "public accommodation" under *N.J.S.A.* 10:5-5(l), and thus that the Association's refusal to host their civil-union ceremony violates the LAD. But the LAD does not apply because the Association is a religious organization with a mission of evangelism and community outreach; the Pavilion is one of its many places of worship; and the Wedding Ministry is one of the ministries through which it seeks to create evangelism opportunities and promote and support marriage. Complainants sought a novel expansion of the Association's Wedding Ministry, seeking to use the Pavilion—one of the Association's places of worship—for their civil-union ceremony. But under these circumstances, the Pavilion is not a public accommodation, and thus the LAD does not apply.

A. The Pavilion Is a Place of Worship Operated by a Religious Organization.

"[T]he Legislature clearly did not intend to subject" "a place of worship" or "religious programs" "to the LAD." *Wazeerud-Din v. Goodwill Home and Missions, Inc.*, 325 *N.J. Super.*

3, 10 (App. Div. 1999). Accordingly, the "longstanding construction of the LAD," reaffirmed by the DCR's current director in April 2010, is that places of religious worship "are not 'public accommodations' within the meaning of the LAD[.]" Stipulation of Settlement, *Ocean Grove Camp Meeting Association v. Le*, Case No. 3:07-cv-03802-JAP-TJB, at ¶ 1 (D. N.J. April 22, 2010) (R. Ex. 4) (quoting Aff. of C. Gregory Stewart, Director of New Jersey Division on Civil Rights, *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, at ¶ 10 (June 4, 1992) (R. Ex. 4-A)). A religious organization is thus "free to practice discrimination, . . . as dictated by [its] faith, [by] denying access to and use of any place of worship under [its] care." Supp. Aff. of C. Gregory Stewart, Director of New Jersey Division on Civil Rights, *Cummings v. Florio*, at ¶ 20 (March 24, 1995) (R. Ex. 4-A).

The Association is a religious organization with an evangelical mission to reach out to the community by "provid[ing] opportunities for spiritual birth, growth, and renewal through worship, education, cultural and recreational programs for persons of all ages in a Christian seaside setting." Rasmussen Cert. at ¶ 11 (R. Ex. 1). The Pavilion is one of its places of worship and religious outreach where *every day* during the summer (except some Saturdays)—either through Pavilion Praise, the Breakfast Club, Gospel Music Ministries, or camp-meeting events—the Association proclaims the Gospel message of Jesus Christ and provides opportunities to worship God. *Id.* at ¶ 46. These worship services and overtly religious activities account for an overwhelming majority of the events that occur in the Pavilion. *Id.* at ¶ 47. It is thus undeniable that the Pavilion is a place of worship and has functioned as such since its inception. *Id.* at ¶¶ 42-43, 45.

As further evidence, the Pavilion is legally classified as "church and charitable property," meaning that it is owned by a religious organization and is actually and exclusively used for the

organization's work. The Pavilion's official "property class" is "15D." Pavilion Property Classification at 1 (R. Ex. 33). Class 15D constitutes "church and charitable" property. *N.J.A.C.* 18:12-2.2(o). Property classified as such is "real property owned by religious and charitable organizations actually and exclusively used in the work of the organizations." *Ibid.* This property classification thus further establishes that the Pavilion is a place of worship used exclusively for the Association's religious work, and confirms that the LAD does not apply to the Pavilion.

B. The Public-Accommodation Analysis Focuses on the Requested Use of the Pavilion—the Wedding Ministry—Not the Other Uses of that Facility.

Public-accommodation analysis involving a religious organization or a place of worship focuses on the complainant's particular request to use the respondent's facility, rather than the other uses of the sought-after facility or the other irrelevant activities of the respondent organization. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12 (focusing on the program that the complainant wanted to access and finding it "unnecessary to decide" "if some of the [organization's] other activities were considered public accommodations"); *cf. Donaldson v. Farrakhan*, 762 *N.E.*2d 835, 838 (Mass. 2002) (requiring the plaintiffs to show that the theatre where the defendant held a religious service "was a place of public accommodation *on the night in question*") (emphasis added). This focused analysis is necessary to avoid the "serious constitutional questions" that would arise if the government were to apply the LAD broadly and impermissibly "entangle" itself with religion. *Wazeerud-Din, supra*, 325 *N.J. Super.* at 10-11.

But in its Finding of Probable Cause, the DCR erred by focusing on the fact that, when the Association is not using the Pavilion for its own programs or ministries, it allows the public to enter for "conservation and recreational uses" such as sitting, congregating, or seeking shelter from the sun or weather. *See* Finding of Probable Cause at 8-9. That, however, is not the

Pavilion use at issue here. Complainants did not request to use (nor would the Association have denied a request to use) the Pavilion for those recreational purposes; instead, Complainants asked the Association to host their civil-union ceremony in the Pavilion under the auspices of its Wedding Ministry. The public-accommodation analysis thus should focus on the Wedding Ministry, rather than these informal recreational uses of the Pavilion.

Moreover, as a practical matter, it cannot be true that the Association's permitting the public to sit, rest, or seek shelter in the Pavilion—which, in combination with the many signs promoting the Association's events, is a means of evangelism for the Association, *see* Rasmussen Cert. at ¶ 58 (R. Ex. 1)—subjects *all the Association's activities in that place of worship, including its own ministries*, to the LAD. Many churches and religious organizations, particularly those with scenic beauty or historical significance, permit the public to enter for informal recreational purposes such as sitting, resting, or enjoying the scenery. *See id.* at ¶ 60. Examples of these, both in State and out of State, include St. Patrick's Cathedral in New York City and the Church of St. Gabriel in Marlboro, New Jersey, to name a few. *See* Publicly Accessible Churches (R. Ex. 20). But governing legal authority indicates that such religious hospitality does not subject such religious organizations or the Association to the LAD when operating their other ministries. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12-13 ("By offering such beneficence [to the public], a church [or religious organization] does not become a public accommodation which must allow anyone to participate in its religious activities"). Therefore, following the DCR's reasoning in its Finding of Probable Cause would have a far-reaching effect on many religious organizations, subjecting all their ministries to the LAD and upsetting established law.

In its Finding of Probable Cause, the DCR also erred by focusing on the Association's receipt of the Green-Acres exemption. *See* Finding of Probable Cause at 8-9. But that fact does not transform the Association or the Pavilion into a public accommodation for purposes of this case. First, the Association's continued receipt of the Green-Acres exemption for portions of its beachfront property not at issue here does not convert the Association into a public accommodation for all purposes. Again, the analysis must focus on the particular facility and requested use at issue in the case. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12. Reasoning otherwise would transform all the Association's places of worship and ministry programs—not to mention all the places of worship and ministry programs operated by other religious organizations that receive the Green-Acres exemption, *see* Rasmussen Cert. at ¶ 103 (R. Ex. 1)—into public accommodations subject to the LAD. No legal authority supports such a sweeping result. Second, neither does the Association's former receipt of the Green-Acres exemption for the parcel on which the Pavilion is located convert that facility into a public accommodation for purposes of this case. Notably, the DEP revoked the Green-Acres exemption for the parcel on which the Pavilion is located, *see id.* at ¶ 100, and in doing so, declared that the exemption does not apply to the Pavilion. Thus, in the eyes of the State, the Pavilion does not qualify for the Green-Acres exemption, and it would be error to rely on that now defunct fact in the public-accommodation analysis. Simply put, the Green-Acres issue is a red herring. The relevant analysis, as discussed herein, focuses on Complainants' requested use of the Pavilion and thus the Association's Wedding Ministry.[3]

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[3] The Association did not need the Green-Acres exemption to obtain a real-property tax exemption for the parcel on which the Pavilion is located. Soon after the DEP revoked the Green-Acres exemption, the Association obtained a religious exemption because the Pavilion is owned by a religious organization and is used as a place of worship in the Association's work.

In short, it is a separate question, not before this tribunal, whether the Association's allowing the public to sit and relax in the Pavilion (or the Association's applying for a Green-Acres exemption because it allows the public to sit and relax in the Pavilion) subjects it to the LAD if it were to deny an individual's access to the Pavilion for those purposes. The issue here is different, and it thus requires analysis focusing on Complainants' requested use.

C. The Association's Wedding Ministry Is Not Subject to the LAD.

Complainants sought to use the Pavilion as part of the Association's Wedding Ministry, and in doing so, asked the Association to extend that ministry in a way that conflicts with its sincerely held religious beliefs. But as will be demonstrated herein, the LAD does not apply under such circumstances.

The Wedding Ministry is, among other things, part of the Association's evangelism and outreach to the community. Rasmussen Cert. at ¶ 67 (R. Ex. 1). This ministry creates evangelism opportunities through interaction between the Wedding Committee and the community (i.e., the couple and their families) and, sometimes, between a Methodist minister and the couple. *Id.* at ¶¶ 68-69, 78. Through this ministry, the Association also seeks to communicate in its facilities the message inherent in every wedding ceremony—that marriage is the union of one man and one woman—which is consistent with its religious beliefs. *Id.* at ¶¶ 70-74. And the Association additionally seeks to serve the community—an affirmative religious commandment—by providing extensive wedding-related assistance to the couple for a small fee, which is roughly 6% of the fair-market value, is sometimes reduced or waived altogether, and

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See Rasmussen Cert. at ¶ 104 (R. Ex. 1); *N.J.A.C.* 18:12-2.2(o). So to the extent that the government originally exempted the Pavilion on an arguably inapplicable basis, it has since changed that, and in the process, affirmed the Pavilion as one of the Association's places of worship.

does little more than cover the upkeep costs and expenses of the facilities. *Id.* at ¶¶ 76-77, 81-84, 89; Monmouth County Wedding Costs at 1-2 (R. Ex. 24). In short, the Wedding Ministry is a religious ministry, permeated by distinctly religious purposes, and directly related to the Association's essential mission of Christian evangelism; it is thus not subject to the LAD. *See Wazeerud-Din, supra*, 325 *N.J. Super.* at 12 (finding that the LAD did not apply because the organization's "essential mission [was] religious indoctrination and worship" and the program that the complainant wanted to attend was "directly related to th[at] mission").

"[T]he consistent construction and interpretation of the LAD" by the courts, the Attorney General, and the DCR is "that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the State [is] not authorized to regulate or control religious . . . governance, practice or liturgical norms, even where ostensibly or colorably at odds with any of the LAD prohibited categories of discrimination." Stipulation of Settlement, *Ocean Grove Camp Meeting Ass'n v. Le*, at ¶ 5 (R. Ex. 4) (quoting Stewart Aff. at ¶ 10); *see also Wazeerud-Din, supra*, 325 *N.J. Super.* at 10; *Presbytery of N.J. of Orthodox Presbyterian Church v. Florio*, 40 *F.*3d 1454, 1461 (3d Cir. 1994); N.J. Att'y Gen. Formal Op. No. 1-2007, 187 N.J.L.J. 367 (2007) (R. Ex. 51) (discussing the solemnization of civil unions). In light of this, the DCR has stated that it "has no intention of construing or enforcing the LAD in any manner which . . . would even tend or threaten to violate the sincere 'tenets' of any religion." Stewart Aff. at ¶ 12 (R. Ex. 4-A). Recently, the Legislature has made clear that "every religious . . . organization in this State may join together in marriage or civil union such persons according to the rules and customs of the . . . organization." *N.J.S.A.* 37:1-13.

Here, however, Complainants seek to apply the LAD in a manner that will directly violate the Association's religious tenets and dictate the practice and operation of its ministry

involving marriage. It would do so by forcing the Association to open its Wedding Ministry to civil-union ceremonies and thus requiring it to change its ministry practice in a way that directly violates its sincerely held religious beliefs. The courts, the Attorney General, and the DCR have all made clear that the LAD does not apply to a place of worship under such circumstances, and thus Complainants' claims should be dismissed because the Pavilion is not a public accommodation for purposes of this case.

II. The Association Did Not Decline to Host Complainants' Civil-Union Ceremony on Account of their Civil-Union Status.

Complainants allege that the Association's denial of their request to host their civil-union ceremony amounts to unlawful discrimination on the basis of "civil-union status." But that assertion rests on a misapprehension of the meaning of civil-union-status discrimination. The Association's refusal to host Complainants' civil-union ceremony had absolutely nothing to do with the couple's civil-union status; it depended entirely on their intended use of the Pavilion, that is, for an inherently expressive civil-union ceremony. The Association did not want to host a civil-union ceremony on its premises because doing so would violate its sincerely held religious beliefs and force the Association to communicate, promote, and associate with a message contrary to its religious beliefs. Complainants' civil-union status was wholly irrelevant to the Association's decision.

New Jersey courts have yet to construe the Legislature's newly created prohibition on civil-union-status discrimination, so this tribunal's analysis should begin with general principles of statutory construction. "In considering questions of statutory interpretation, the first step is to look at the plain meaning of the provision at issue." *Middletown Twp. PBA Local 124 v. Twp. of Middletown*, 193 *N.J.* 1, 12 (2007). "[I]f the Legislature has not provided otherwise, words are to be given 'ordinary and well-understood meanings.'" *Alan J. Cornblatt, P.A. v. Barow*, 153

N.J. 218, 231 (1998). "[T]he court's sole function is to enforce the statute in accordance with [its] terms," it "has no power to substitute its own idea of what a statute should provide in the face of clear and unambiguous statutory requirements." *Middletown, supra*, 193 *N.J.* at 12.

The task is thus to determine the ordinary meaning of "civil-union status." The LAD itself indicates that "civil union" means "a legally recognized union of two eligible individuals established pursuant to [New Jersey law]." *N.J.S.A.* 10:5-5(ss). And the ordinary meaning of "status" is "[a] person's legal condition." Black's Law Dictionary 1447 (8th ed. 2004). Hence, "civil-union status" means a person's legal condition of having entered or not having entered a legally recognized civil union.

This interpretation of "civil-union status" is confirmed by the well-established meaning of "marital status," which is the statutory term found next to civil-union status in the LAD. *See N.J.S.A.* 10:5-12(f)(1). New Jersey courts have found that the prohibition on marital-status discrimination prevents an entity covered by the LAD from basing its "decision . . . on the fact that an individual is either married or single." *Thomson v. Sanborn's Motor Express, Inc.*, 154 *N.J. Super.* 555, 560 (App. Div. 1977). This understanding of marital-status discrimination has been embraced by courts across the country. *See, e.g., Manhattan Pizza Hut, Inc. v. N.Y. State Human Rights Appeal Bd.*, 415 *N.E.*2d 950, 953 (N.Y. 1980) ("[T]he plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage"); *Donato v. Am. Tel. and Telegraph Co.*, 767 *So.* 2d 1146, 1155 (Fla. 2000) ("[T]he term 'marital status' . . . means the state of being married, single, divorced, widowed or separated"). "[W]hen the Legislature utilizes words that have previously been the subject of judicial construction, it is deemed to have used those words in the sense that has been ascribed to them." *Perez v. Rent-A-Center, Inc.*, 186 *N.J.* 188, 211 (2006);

see also Johnson v. Scaccetti, 192 *N.J.* 256, 277 (2007). Thus, this understanding of "marital status" applies equally to the similar concept of "civil-union status."

Applying this understanding of "civil-union status," it is indisputable that the Association did not decline to host Complainants' civil-union ceremony because of their civil-union status. The Association acted as it did because it was concerned that permitting the intended use of the Pavilion—for a civil-union ceremony—would violate its sincerely held religious beliefs and constitutional rights. *See* Rasmussen Cert. at ¶¶ 118, 120, 128 (R. Ex. 1). Complainants' civil-union status had nothing to do with that decision. The Association would have made the same decision regardless of Complainants' civil-union status. In other words, it did not matter whether Complainants had yet to enter a legally recognized civil union, as was the case here, or whether Complainants had already entered that legal union; the Association would have denied their request in either event because of the direct violation of its religious beliefs and constitutional rights.

Neither did it matter to the Association that Complainants' civil-union ceremony would result in a particular legal status. The mere act of hosting a civil-union ceremony would have violated the Association's religious beliefs; it did not matter whether that ceremony would create a legal status between the partners. Similarly, the Association's constitutional concerns of expressive association and compelled speech, as will be discussed below, derive from the inherent message communicated by the civil-union ceremony, and those concerns apply fully regardless of whether that ceremony would create a legal status between the partners.

Nor can it be said that the Association discriminated against Complainants because they had entered into the legal status of a civil union; after all, Complainants had yet to obtain that legal status. Civil-Union Certificate (R. Ex. 42). Thus, Complainants, perhaps sensing this

weakness in their claim, allege in their complainant that the Association refused to host their ceremony "because of their *impending* civil union status." Complaint at 1 (emphasis added). The Legislature, however, did not create a protected classification based on a person's *impending* status. Complainants' own allegations, then, by focusing on their impending status, show that they are attempting to stretch the concept of civil-union status beyond what the statutory language can bear. But neither Complainants nor this tribunal can "substitute [their] own idea of what a statute should provide in the face of clear and unambiguous statutory requirements." *See Middletown, supra*, 193 *N.J.* at 12. Complainants thus have not presented a valid claim of civil-union-status discrimination.[4]

III. Applying the LAD to Force the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Violate the Association's Right of Expressive Association under the United States Constitution.

Applying the LAD as Complainants request would force the Association to host an inherently expressive civil-union ceremony in its Pavilion where worship services and religious activities are regularly held. This would significantly interfere with the Association's internal affairs, burden the Association's expression, and make involvement with the Association less desirable or attractive thereby threatening to affect the Association's composition. This application of the LAD would thus violate the Association's rights of expressive association.

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[4] Neither did the Association discriminate against Complainants on the basis of their sexual orientation. Individuals who identify as homosexual are free to use the Pavilion consistent with its permitted uses, and the Association welcomes and encourages all such individuals to attend its worship services and ministry-related events. Rasmussen Cert. at ¶¶ 114-15 (R. Ex. 1). The Association declined Complainants' request only because it involved an expressive ceremony communicating a message that contradicted the Association's religious beliefs about the fundamental structure of marriage. *See id.* at ¶¶ 118, 120, 128. This decision was motivated not by the status of the messenger but by the message itself, and therefore, does not constitute unlawful discrimination.

The United States Supreme Court "has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. United States Jaycees*, 468 *U.S.* 609, 618, 104 *S. Ct.* 3244, 3249, 82 *L. Ed.* 2d 462 (1984); *see also U.S. Const.* amend. I. That Court has thus "upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 *U.S.* 537, 544, 107 *S. Ct.* 1940, 1945, 95 *L. Ed.* 2d 474 (1987). "Freedom of association . . . plainly presupposes a freedom not to associate." *Roberts*, *supra*, 468 *U.S.* at 623, 104 *S. Ct.* at 3252.

"[T]he freedom of expressive association protects more than just a group's membership decisions." *Rumsfeld v. FAIR*, 547 *U.S.* 47, 69, 126 *S. Ct.* 1297, 1312, 164 *L. Ed.* 2d 156 (2006). "Government actions that . . . unconstitutionally burden this freedom may take many forms." *Boy Scouts of Am. v. Dale*, 530 *U.S.* 640, 648, 120 *S. Ct.* 2446, 2451, 147 *L. Ed.* 2d 554 (2000). Among other things, the government may violate an organization's right of expressive association by "interfer[ing] with the internal organization or affairs of the group." *Roberts*, *supra*, 468 *U.S.* at 622-23, 104 *S. Ct.* at 3252. Indeed, "[a]s the definition of 'public accommodation' has expanded [under state law] . . . , the potential for conflict between state public accommodations laws and the First Amendment rights of organizations has increased." *Dale*, *supra*, 530 *U.S.* at 657, 120 *S. Ct.* at 2456. Here, through a broad application of the LAD, Complainants ask the State to interfere significantly with the internal affairs of a religious organization by requiring the Association to include Complainants' civil-union ceremony in its Wedding Ministry, even though hosting such unions would contravene the Association's religious beliefs, expression, and practices.

A. The Association Is Protected by the First Amendment Right of Expressive Association.

The Supreme Court laid out the legal analysis for an expressive-association claim in *Dale*. The first step is to "determine whether a group is protected by the First Amendment's expressive associational right[.]" *Dale*, *supra*, 530 *U.S.* at 648, 120 *S. Ct.* at 2451. To make that determination, a court "must determine whether the group engages in 'expressive association.'" *Ibid.* "The First Amendment's protection of expressive association is not reserved for advocacy groups," *ibid.*, or for organizations that "trumpet [their] views from the housetops," *id.* at 656, 120 *S. Ct.* at 2455. "[T]o come within its ambit, a group must [simply] engage in some form of expression, whether it be public or private." *Id.* at 648, 120 *S. Ct.* at 2451. Stated differently, an organization does "not have to associate for the 'purpose' of disseminating a certain message in order to be entitled to the protections of the First Amendment. [It] must merely engage in expressive activity that could be impaired in order to be entitled to protection." *Id.* at 655, 120 *S. Ct.* at 2454.

The Association unquestionably engages in expression and expressive activity. In fulfilling its evangelical mission to provide opportunities for spiritual birth, the Association regularly communicates the Gospel message of salvation in Jesus Christ through various means of expression. Rasmussen Cert. at ¶ 33 (R. Ex. 1). And in fulfilling its mission to provide opportunities for spiritual growth through educational programs, it regularly preaches, teaches, and seeks to instill Biblical Christian values in all who attend its programs and worship services. *Id.* at ¶ 39. This Biblical teaching at times includes expressing and supporting Christian values about the basic structure, understanding, and function of marriage. *Id.* at ¶ 40. Of particular note, the Association uses the Pavilion almost daily during the summer—through Pavilion

Praise, the Breakfast Club, Gospel Music Ministries, and camp-meeting events—to communicate these evangelical messages and instill these Biblical Christian values. *Id.* at ¶ 49.

These activities plainly entitle the Association to protection under the First Amendment's right of expressive association. "It seems indisputable that an association that seeks to transmit . . . a system of values engages in expressive activity." *Dale*, *supra*, 530 *U.S.* at 650, 120 *S. Ct.* at 2452. This is particularly true for religious organizations, like the Association, that "engage in religious activities . . . to foster and communicate a common system of beliefs and values for . . . others to follow." *Donaldson*, *supra*, 762 *N.E.*2d at 840; *see also Murdock v. Pennsylvania*, 319 *U.S.* 105, 108-09, 63 *S. Ct.* 870, 872-73, 87 *L. Ed.* 1292 (1943) (acknowledging that religious evangelism "has the same claim as . . . others to the guarantees of freedom of speech"). It is thus undisputable that the Association is protected by the First Amendment right of expressive association.

B. Forcing the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Significantly Affect its Ability to Express its Views.

The legal analysis next considers whether requiring the Association to host Complainants' civil-union ceremony in the Pavilion "would significantly affect [its] ability to [express its] public or private viewpoints." *Dale*, *supra*, 530 *U.S.* at 650, 120 *S. Ct.* at 2452. This inquiry first requires brief consideration of the Association's views on marriage, same-sex unions, and homosexual conduct.

Courts should deferentially assess an organization's professed views, readily adopting the organization's characterization of its beliefs. *See id.* at 651, 120 *S. Ct.* at 2452 ("We accept the [organization's] assertion [about its beliefs]. We need not inquire further . . ."). To the extent that a court reviews an organization's expressed views at all, it does so only to assess "the

sincerity of the professed beliefs." *Ibid.* It is most assuredly "not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent." *Ibid.*

The Association believes that marriage is the union of one man and one woman, that this union represents the loving and committed relationship between Jesus Christ and His Church, and that this union is the only sacred romantic union approved by the Bible. Rasmussen Cert. at ¶¶ 72, 105-06 (R. Ex. 1). It communicates these religious principles about marriage through its services, programs, and events. *Id.* at ¶ 107. The Association also believes that marriage is a vital social institution worthy of support. *Id.* at ¶ 108. In contrast, the Association believes that the "practice of homosexuality" is incompatible with Christian teaching and that it cannot allow same-sex civil-union ceremonies in the facilities used for worship services. *Id.* at ¶¶ 109-10. Neither does the Association want to promote homosexual conduct as appropriate; nor does it want to support same-sex unions as morally legitimate. *Id.* at ¶¶ 111-12. The sincerity of these beliefs is unassailable and should be accepted by this tribunal.

Having established the Association's views, the analysis next considers the effect that hosting Complainants' civil-union ceremony would have on the Association's ability to communicate its views. Courts "must . . . give deference to an association's view of what would impair its expression." *Dale, supra,* 530 *U.S.* at 653, 120 *S. Ct.* at 2453. The Association fervently believes, and herein demonstrates, that hosting Complainants' civil-union ceremony in the Pavilion would significantly affect its ability to express its views. *See* Rasmussen Cert. at ¶ 135 (R. Ex. 1). This tribunal should defer to the Association's views on this matter.

It is important to note at the outset that Complainants sought to hold an inherently expressive ceremony on the Association's property. Civil-union ceremonies necessarily involve

expression, including vows and legal pronouncements, communicated among the couple and a legal officiant, *see N.J.S.A.* 37:1-13 to 37:1-19; and those ceremonies require that witnesses observe and attest to this mandated expression, *see N.J.S.A.* 37:1-17. Fitting squarely within this mold, Complainants' ceremony was particularly expressive: it included numerous communicative marriage rituals, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 9-12 (R. Ex. 45); spiritual messages, *see* Pivinski Email at 2 (R. Ex. 47); a prayer of blessing, *see* Civil-Union Program at 2 (R. Ex. 46); the exchanging of vows, *see ibid.*; a legal pronouncement, *see ibid.*; and 80 guests who witnessed and shared in the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 1-2 (R. Ex. 45). Further evidencing their expressive purpose, Complainants used a microphone to communicate during the ceremony. *See* Civil-Union Pictures at 5-6, 9 (R. Ex. 44). In sum, Complainants' civil-union ceremony was undoubtedly an expressive event.

Not only was Complainants' ceremony expressive, it communicated messages that are antithetical to the Association's beliefs and expressions. In direct contrast to the Association's religious belief and expression that marriage is the uniting of one man and one woman, Complainants' ceremony communicated and endorsed the idea of a sacred marital union between two persons of the same sex. Most notably, Complainants and their officiants repeatedly proclaimed that the two women were entering a "marriage," *see* Compl'ts Resp. to Resp't First Req. for Interrogs. at No. 8 (R. Ex. 41); Ketubah Photos at 1-3 (R. Ex. 50)—a message reinforced by the many Jewish-marriage rituals incorporated into the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at Nos. 9-12 (R. Ex. 45).

Additionally, Complainants' ceremony explicitly promoted homosexual conduct as appropriate, which is contrary to the Association's desire not to promote it. Among other things,

Complainants stated that they included a lavender ribbon in their braiding ritual because it "is the traditional lesbian color," *see* Ceremony Agenda at 1 (R. Ex. 48); Mr. Pivinski stated that "God's spirit has shown [Complainants] the way to each other and has set their hearts afire for one another," *see* Pivinski Email at 2 (R. Ex. 47); Rabbi Landsberg stated that Complainants "embraced as friends, as lovers, and as unwavering companions," *see* Ketubah Photos at 1-3 (R. Ex. 50); and the two women kissed and embraced at the conclusion of the ceremony, *see* Compl'ts Resp. to Resp't Supp. Req. for Interrogs. at No. 6 (R. Ex. 45); Civil-Union Pictures at 13 (R. Ex. 44). Similarly, by its very nature, Complainants' ceremony communicated approval for same-sex unions, despite the fact that the Association does not want to express support for such unions as morally legitimate.

Complainants' ceremony would significantly affect the Association not only because it communicates messages that are directly antithetical to the Association's beliefs, but also because it would occur in a facility where the Association almost daily conducts worship services or religious activities. *See* Rasmussen Cert. at ¶¶ 46, 49 (R. Ex. 1). So in the very same place of worship where the Association conducts religious services and programs proclaiming Biblical truths about marriage, it would be forced to host—under the auspices of its Wedding Ministry—a ceremony that sends directly contradictory messages and violates its religious faith.

If the Association were required to host Complainants' ceremony in its Pavilion, the message of Complainants' ceremony would be directly associated with the Association. *See* Rasmussen Cert. at ¶ 136 (R. Ex. 1). For starters, the Pavilion is covered with signs advertising the Association's worship services and ministry events. *Id.* at ¶ 48; Pavilion-Sign Pictures at 2-4, 6-8, 10-13 (R. Ex. 19). Additionally, every event in the Pavilion requires prior approval from the Association, *see* Rasmussen Cert. at ¶¶ 54, 62 (R. Ex. 1); and thus Complainants' ceremony

"would likely be perceived as having resulted from the [Association's] customary determination . . . that [an event] was worthy of presentation and quite possibly of support." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 *U.S.* 557, 575, 115 *S. Ct.* 2338, 2348, 132 *L. Ed.* 2d 487 (1995). The link between the Association and Complainants' ceremonial message would be particularly strong because Complainants' ceremony would take place under the Association's Wedding Ministry and be attended by at least one member of the Wedding Committee, whose presence would signify the Association's approval of and support for Complainants' ceremony. *See* Rasmussen Cert. at ¶ 65 (R. Ex. 1).

The impact on the Association's expression is particularly acute for events held in the open-air Pavilion because the messages communicated through all services and ceremonies therein are broadcast to all who pass by. *See* Rasmussen Cert. at ¶¶ 44, 74 (R. Ex. 1). Hosting Complainants' civil-union ceremony in the Pavilion as part of its Wedding Ministry "would, at the very least, force the organization to send a message . . . to . . . the world" that it affirms and supports sacred romantic unions between persons of the same sex. *See Dale*, *supra*, 530 *U.S.* at 653, 120 *S. Ct.* at 2454. This would certainly make it difficult for the Association to communicate its own views about marriage, same-sex unions, or homosexual conduct, all of which are directly contrary to the views communicated through Complainants' ceremony. In short, forcing the Association to host Complainants' civil-union ceremony in the Pavilion would significantly burden its ability to express its views.[5]

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[5] An additional consideration is that interfering with the internal affairs of a *religious organization* by requiring it to violate its religious beliefs and practices imposes a significant burden on that organization's associational rights. *See Donaldson*, *supra*, 762 *N.E.*2d at 841 ("Forcing the [religious organization] and its leaders to include women in the meeting . . . would . . . be in direct contravention of the religious practice of the [organization]. This would be a significant burden on the [organization]."); *Erichsen v. His Supper Table*, No. WSHRC: 25PX-

In addition to significantly burdening the Association's expression, applying the LAD under these circumstances would also make involvement with the Association less desirable or attractive and thus threaten to interfere with the Association's composition. *See* Rasmussen Cert. at ¶ 138 (R. Ex. 1). It would, for instance, make involvement as a voting Board member less desirable for many people eligible to participate in that role. *See ibid.* Every voting Board member must be a member or clergy of the United Methodist Church. *Id.* at ¶ 17. That Church and thus its members and clergy are governed by the Book of Discipline, which, like the Association, affirms that marriage is "between a man and a woman," *see* Book of Discipline at ¶ 161(C), "does not condone the practice of homosexuality," *see* Book of Discipline at ¶161(G), and refuses to host "[c]eremonies that celebrate homosexual unions," *see* Book of Discipline at ¶341(6). So forcing the Association to host civil-union ceremonies would require it to engage in conduct that violates the official beliefs of the United Methodist Church and its members. This undoubtedly would make membership as a voting member on the Association's Board less attractive to many members and clergy of the United Methodist Church, the only class of persons eligible to join the Association in that capacity.

Forcing the Association to host civil-union ceremonies would also make involvement as a volunteer or employee of the Association less desirable to many eligible people. *See* Rasmussen Cert. at ¶ 138 (R. Ex. 1). As a Christian organization, the Association operates primarily through the employment of and volunteer assistance provided by professing Christians, and it requires

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1021-07-8, Investigative Finding of the Washington State Human Rights Commission at 2-3 (June 16, 2008) (R. Ex. 52) ("Because Respondent is a religious organization, guaranteed expressive freedoms of religion and association . . . , [it] can choose to not associate with homosexuals if doing so violates its religious tenets"). Applying the LAD to the Association under these circumstances would impose this significant burden on the associational rights of a religious organization, and it thus would create additional constitutional concerns.

employees and volunteers in certain ministry-related positions to provide a statement of their Christian faith. *Id.* at ¶¶ 21-22. Most Christians, as demonstrated by the beliefs of the large, mainstream Christian Churches (including the United Methodist Church), affirm marriage between one man and one woman, disapprove of homosexual conduct, and reject unions of same-sex couples. *See* Roman Catholic Church's Statement at 1-7 (R. Ex. 38); Southern Baptist Convention's Statement at 1-2 (R. Ex. 39). Requiring the Association to act contrary to these widely held Christian beliefs would thus make involvement with the Association less desirable to the group of Christians eligible to participate in these particular roles. And the Association, it must be noted, relies heavily on its volunteers to operate its many programs and events, *see* Rasmussen Cert. at ¶ 23 (R. Ex. 1); thus, anything that risks decreasing its pool of willing volunteers threatens to burden its operations.[6]

Moreover, participation in the Wedding Ministry, which operates solely through volunteers, would also be less attractive to many Christians. Members of the Wedding Committee are actively involved in the wedding process—meeting the couple, attending the rehearsal and wedding, and offering hands-on wedding-coordination assistance. *See* Rasmussen Cert. at ¶¶ 65, 76 (R. Ex. 1). But many Christians would not want to provide similar support for a same-sex ceremony because doing so would directly conflict with their sincerely held religious beliefs. In sum, then, forcing the Association to host civil-union ceremonies would make

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[6] Likewise, forcing the Association to host civil-union ceremonies will likely have a negative impact on its fundraising. The Association is a nonprofit organization that depends on donations from its ministry supporters, most of whom are professing Christians. Rasmussen Cert. at ¶¶ 24-25 (R. Ex. 1). Thus, requiring the Association to act contrary to certain widely held Christian beliefs could cause some of its ministry supporters to discontinue or decrease their financial support. This negative financial impact threatens to further burden the Association's operations. *See id.* at ¶ 24.

involvement with the Association less desirable or attractive for some Board members, employees, and volunteers, thus threatening to interfere with the Association's composition.

C. The State's Interest in the LAD Does Not Justify this Significant Burden on The Association's Right of Expressive Association.

Having determined that forcing the Association to host Complainants' civil-union ceremony would significantly burden its expression, the last step of the expressive-association analysis requires a comparison between this substantial intrusion of the Association's rights and the government's interest in the LAD. *See Dale*, *supra*, 530 *U.S.* at 658-59, 120 *S. Ct.* at 2456. The United States Supreme Court has already conducted this analysis under similar circumstances and thus established binding precedent to follow. That Court in *Dale* said:

> We have already concluded that [this application of New Jersey's public-accommodation law] would significantly burden the organization's right to oppose or disfavor homosexual conduct. *The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the [organization's] rights to freedom of expressive association.* That being the case, we hold that the First Amendment prohibits the State from imposing such a requirement through the application of its public accommodations law.

Id. at 659, 120 *S. Ct.* at 2457. *Dale* thus establishes that New Jersey's interests underlying the LAD do not justify this significant burden on the Association's right of expressive association, and as a result, this application of the LAD would violate the Association's constitutional rights.

IV. Applying the LAD to Force the Association to Host Complainants' Inherently Expressive Civil-Union Ceremony in its Pavilion Would Result in a Compelled-Speech Violation under the United States and New Jersey Constitutions.

Freedom of speech is protected under the United States and New Jersey Constitutions. *See U.S. Const.* amend. I; *N.J. Const.* art. I, § 6. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley*, *supra*, 515 *U.S.* at 573, 115 *S. Ct.* at 2347 (quotation marks omitted); *see also Wooley v. Maynard*, 430 *U.S.* 705, 714, 97 *S. Ct.* 1428, 1435, 51 *L. Ed.* 2d 752 (1977) ("[T]he First Amendment . . .

includes both the right to speak freely and the right to refrain from speaking"). The First Amendment thus prohibits "the government from compelling [private organizations] to express certain views." *See United States v. United Foods, Inc.*, 533 *U.S.* 405, 410, 121 *S. Ct.* 2334, 2338, 150 *L. Ed.* 2d 438 (2001).

"[C]ompelled-speech cases are not limited to the situation in which an individual must personally speak the government's message. [The courts] have also in a number of instances limited the government's ability to force one speaker to host or accommodate another speaker's message." *Rumsfeld, supra*, 547 *U.S.* at 63, 126 *S. Ct.* at 1309. "The compelled-speech violation in [those] cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate." *Ibid.* And as will be demonstrated below, that is precisely what would occur here if the Association were forced to host Complainants' civil-union ceremony.

Again, it is important to emphasize that Complainants sought to engage in expression in the Association's facility. As previously demonstrated, Complainants' civil-union ceremony was an expressive event that communicated messages to all who observed it, and Complainants ask the State to use the LAD to force the Association to host this communicative event in its open-air Pavilion. *See supra* at pp. 34-35.

Also as discussed above, Complainants' expression in the Pavilion would be linked to the Association because (1) the Association almost daily holds its own services and programs in the Pavilion to communicate its values and beliefs; (2) the Association approves and supports every event held in the Pavilion; (3) all wedding ceremonies held on the Association's premises are part of its Wedding Ministry and attended by a member of the Wedding Committee; and (4) the Pavilion is covered with signs advertising the Association's worship services and ministry

events. *See Hurley, supra*, 515 *U.S.* at 575, 115 *S. Ct.* at 2348 (noting that the speaker's message "would likely be perceived as having resulted from the [host's] customary [approval]"); *see also supra* at pp. 36-37.

The Association is not a silent host, however; it engages in its own expression through its use of the Pavilion—activities that include its worship services, its religious programs, and, most notably here, its operation of the Wedding Ministry. *See* Rasmussen Cert. at ¶ 71 (R. Ex. 1). One of the purposes of the Wedding Ministry is for the Association to promote and communicate the message inherent in every wedding ceremony held in its facilities—that marriage is the uniting of one man and one woman. *See id.* at ¶¶ 70, 73-74. Such ceremonies, by their very nature, proclaim this understanding of marriage through a solemn event laden with expression and attended by witnesses. *See id.* at ¶ 73. The Association thus communicates this message through its Wedding Ministry and, by extension, through every wedding ceremony held in its facilities. *See id.* at ¶¶ 73-74. And of particular note here, the wedding ceremonies in the open-air Pavilion communicate this message to a broader public audience. *Id.* at ¶ 74.

The Association's own message through its Wedding Ministry—proclaiming marriage as the uniting of one man and one woman—would be substantially affected by permitting Complainants' expressive ceremony. *See* Rasmussen Cert. at ¶ 139 (R. Ex. 1). As discussed above, Complainants' civil-union ceremony communicated messages that are antithetical to the Association's beliefs and expressions. *See supra* at pp. 35-36. And it is undeniable that forcing an organization to associate with directly contrary views burdens its own expression. *See Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 *U.S.* 1, 18, 106 *S. Ct.* 903, 913, 89 *L. Ed.* 2d 1 (1986) (plurality) ("Such forced association with . . . hostile views burdens the expression of views different from [those of the hosted speaker]").

More specifically, hosting Complainants' civil-union ceremony would affect the Association's own expression by forcing it "either to appear to agree with [Complainaints'] views or to respond." *Id.* at 15, 106 *S. Ct.* at 911. "This pressure to respond is particularly apparent" where, as here, "the owner has taken a position [contrary] to the view being expressed on [its] property." *Id.* at 15-16, 106 *S. Ct.* at 911 (quotation marks omitted); *see also id.* at 18, 106 *S. Ct.* at 913 ("Such forced association with . . . hostile views . . . risks forcing [the organization] to speak where it would prefer to remain silent"). So if the Association were required to host Complainants' ceremony, it would feel pressured to speak out against that ceremony and the messages conveyed therein. Rasmussen Cert. at ¶ 132 (R. Ex. 1). But while the Association does not support same-sex civil unions or homosexual conduct, it does not want to be forced specifically to speak out against civil-union ceremonies. *Id.* at ¶ 133. "That kind of forced response is antithetical to the . . . First Amendment[.]" *See Pac. Gas and Elec. Co.*, *supra*, 475 *U.S.* at 16, 106 *S. Ct.* at 911-12.

Also, applying the LAD as suggested by Complainants would affect the Association's expression by requiring it to allow Complainants' expressive use of the Pavilion instead of using it for another expressive event, like a wedding or a worship service, conveying a message it would rather support. *See Miami Herald Publ'g Co. v. Tornillo*, 418 *U.S.* 241, 256, 94 *S. Ct.* 2831, 2839, 41 *L. Ed.* 2d 730 (1974) (noting that one effect on the host's speech was "taking up space that could be devoted to other material [that it] may have preferred to print"). Forcing the Association to replace its desired message—communicating that marriage is the union of one man and one woman—with the contrary message of Complainants' ceremony—promoting, among other things, a marital union between two persons of the same sex—plainly affects the Association's own message.

The Association's expression has already been affected by its genuine concern that the DCR might erroneously force it to host civil-union ceremonies in the Pavilion. Following the events giving rise to this litigation, the Association stopped operating its Wedding Ministry in the Pavilion, *see* Rasmussen Cert. at ¶ 126 (R. Ex. 1)—the facility where, due to its open-air nature, the Association most widely communicates the message of that Ministry, *see id.* at ¶ 74. This tangibly demonstrates that Complainants' suggested application of the LAD will significantly affect (and has already affected) the Association's own expression.

In light of these compelled-speech concerns, the Association has shown that the Constitution forbids the DCR from forcing the Association to host Complainants' civil-union ceremony—that is, unless this application of the LAD satisfies strict-scrutiny analysis, which requires that it be a "narrowly tailored means of serving a compelling state interest." *See Pac. Gas and Elec. Co.*, *supra*, 475 *U.S.* at 19, 106 *S. Ct.* at 913. But for all the reasons that will be discussed in Section V.B. of this brief, strict scrutiny is not satisfied here.

V. Applying the LAD to Force the Association to Alter its Wedding Ministry and Contravene its Sincerely Held Religious Beliefs Would Violate the Association's Right to the Free Exercise of Religion under the United States and New Jersey Constitutions.

A. Strict Scrutiny Applies to the Association's Free-Exercise Claim.

Free exercise of religion is protected under the United States and New Jersey Constitutions. *See U.S. Const.* amend. I; *N.J. Const.* art. I, § 3. "Depending on the nature of the challenged law or government action, a free exercise claim can prompt either strict scrutiny or rational basis review." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 *F.*3d 144, 165 (3d Cir. 2002). There are two reasons why this threatened application of the LAD—which would force the Association to expand its Wedding Ministry by hosting Complainants' civil-union ceremony in violation of its sincerely held religious beliefs—requires strict scrutiny. First, the

relevant legal scheme, which includes the LAD and the DCR's longstanding policy of not applying the LAD to "places of worship," is not neutral or generally applicable. Second, the Association has raised a valid hybrid claim.

1. The Governing Legal Scheme Is Not Neutral or Generally Applicable.

The governing legal scheme fails the neutrality and general-applicability requirements in at least three ways. First, if the DCR were to apply the LAD against the Association here, it would be clear that the DCR does not neutrally apply its "place-of-worship" policy among different religious sects and practices. Second, if the DCR were to apply the LAD against the Association here, it would show that the DCR's place-of-worship policy constitutes a system of individualized exemptions. Third, the LAD's many statutory exemptions render the statutory scheme not generally applicable.

a. If the DCR Were to Apply the LAD Here, It Would Show That the DCR Does Not Neutrally Apply Its Place-of-Worship Policy.

"[T]he protections of the Free Exercise Clause pertain if the law [or policy] at issue discriminates against some or all religious beliefs[.]" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 *U.S.* 520, 532, 113 *S. Ct.* 2217, 2226, 124 *L. Ed.* 2d 472 (1993). "The Free Exercise Clause . . . extends beyond facial discrimination. The Clause forbids subtle departures from neutrality, and covert suppression of particular religious beliefs[.]" *Id.* at 534, 113 *S. Ct.* at 2227 (quotation marks and citations omitted). Thus, "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Ibid.* Statutes or governmental policies that violate the neutrality requirement "must undergo the most rigorous of scrutiny." *Id.* at 546, 113 *S. Ct.* at 2233.

It is the DCR's longstanding policy, reaffirmed by its current director in April 2010, that places of religious worship "are not 'public accommodations' within the meaning of the LAD[.]" Stipulation of Settlement, *Ocean Grove Camp Meeting Ass'n v. Le*, at ¶ 5 (R. Ex. 4) (quoting Stewart Aff. at ¶ 10). The DCR thus admits that prior to this case it has *never before* "prosecuted as a public accommodation under the LAD a . . . place of religious worship." *Id.* at ¶ 4 (quoting Stewart Aff. at ¶ 9).

And in this case, the DCR is most assuredly dealing with a place of worship. The Pavilion is owned by a religious organization, and it is almost daily used for worship services and religious programs. *See* Rasmussen Cert. at ¶¶ 45-46, 49, 104 (R. Ex. 1). So if the DCR were to deviate from its place-of-worship policy and apply the LAD to the Pavilion, the DCR would plainly demonstrate that it does not neutrally apply its policy to all places of worship, but instead, discriminates among different religious sects and practices. *See Fowler v. Rhode Island*, 345 *U.S.* 67, 69-70, 73 *S. Ct.* 526, 527, 97 *L. Ed.* 828 (1953) (finding that the government's application of a local ordinance to prohibit a religious service of Jehovah's Witnesses, but not religious services of Catholic or Protestant sects, violates the Free Exercise Clause because "call[ing] the words which one [minister] speaks . . . a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one [religious organization] over another"). Such a non-neutral application of the DCR's place-of-worship policy would invoke strict scrutiny. *See Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233; *see also Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 167-68 (finding that the government's "selective, discretionary application [of its law]" violated the neutrality requirement because the government "tacitly or expressly granted exemptions from the [law] for various . . . religious . . . purposes," but not for the religiously burdened litigant's purposes).

b. If the DCR Were to Apply the LAD Here, It Would Show That the DCR's Place-of-Worship Policy Constitutes a System of Individualized Exemption.

"[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk v. Pennsylvania*, 381 *F.*3d 202, 209 (3d Cir. 2004) (Alito, J.). And where "a state creates [such] a mechanism for exemptions, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 *F.*3d 359, 365 n.5 (3d Cir. 1999) (Alito, J.) (alterations omitted).

If the DCR were to apply the LAD here, it would show that the place-of-worship policy amounts to a discretionary exemption from the LAD. The DCR has nowhere defined what it means by the term "place of worship." Of course, it would be objectively reasonable to construe a place of worship to mean a facility owned by a religious organization that is regularly used for religious worship. But if the Pavilion—a structure that without question is owned by a religious organization and almost daily used for worship services—is not a "place of worship" exempt from the LAD's reach, then it is doubtful what arbitrary standard the DCR has created for this discretionary exemption.

In sum, if the DCR were to find that the Pavilion is not exempt from the LAD as a place of worship, the DCR would plainly demonstrate that its place-of-worship policy constitutes an individualized, discretionary exemption that can be applied to favor some and discriminate against other types of religious organizations or facilities. *See Blackhawk, supra*, 381 *F.*3d at 210 (finding that a "sufficiently open-ended" exemption brought the case "within the

individualized exemption rule"). And as discussed above, the DCR's refusal to apply its place-of-worship policy to the Pavilion—the place of worship at issue here—would be "sufficiently suggestive of discriminatory intent." *See Fraternal Order of Police*, *supra*, 170 *F.*3d at 365. This would require the application of strict scrutiny. *See Blackhawk*, *supra*, 381 *F.*3d at 209-10.

c. The LAD's Many Statutory Exemptions Render the Statutory Scheme Not Generally Applicable.

"A law burdening religious practice that is . . . not of general application must undergo the most rigorous of scrutiny." *Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233. A law is not generally applicable when the government fails to prohibit conduct "that endangers [its] interests in a similar or greater degree" than the prohibited religious conduct. *Id.* at 543, 113 *S. Ct.* at 2232.

"[C]ategories of selection [and exemption] are of paramount concern when a law has the incidental effect of burdening religious practice." *Id.* at 542, 113 *S. Ct.* at 2232. The LAD is not generally applicable because it contains many categorical exemptions that undermine the statute's general purpose of preventing discrimination to at least the same degree as the Association's decision not to allow its place of worship to be used for a purpose that violates its religious beliefs. *See Blackhawk*, *supra*, 381 *F.*3d at 211 (finding that "[t]he categorical exemptions . . . trigger strict scrutiny because at least some of the exemptions . . . undermine the [governmental] interests . . . to at least the same degree as would an exemption for [the religiously motivated party]").

The LAD's public-accommodation provision, for example, does not apply to an "educational facility operated or maintained by a bona fide religious or sectarian institution." *N.J.S.A.* 10:5-5(l). But allowing an educational facility operated by a religious organization to refuse to admit any person or group because of their protected-class status undermines the

governmental interest in preventing discrimination to a greater degree than would permitting the Association to refuse to host an inherently expressive ceremony that violates its sincerely held religious beliefs. *Cf. Romeo v. Seton Hall Univ.*, 378 *N.J. Super.* 384, 391-92 (App. Div. 2005) (finding Seton Hall University to be an exempt educational facility and thus upholding its refusal to permit a student organization supporting persons who identify as homosexual).

Additionally, the LAD exempts from its real-property-rental provision a "religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization," specifically allowing those organizations to "limit[] admission to or giv[e] preference to persons of the same religion or denomination" or to "mak[e] such selection as is calculated by such organization to promote the religious principles for which it is established or maintained." *N.J.S.A.* 10:5-5(n). But the decision of a religious organization—based on its determination of what will "promote the religious principles for which it is established or maintained"—that it will not rent its real property to a person or group because of their protected-class status undermines the governmental interest in preventing discrimination to at least the same degree as the Association's decision not to allow its property to be used for a purpose that directly conflicts with its religious beliefs. These categorical exemptions thus demonstrate that the LAD does not satisfy the general-applicability requirement. *See Blackhawk, supra*, 381 F.3d at 211.

A simple illustration sharply displays the LAD's lack of general applicability. If the Association were to lease real estate as part of its religious mission, it could refuse to lease those premises to a same-sex couple if it determined that their occupancy of the premises would not "promote the religious principles for which it is . . . maintained." *See N.J.S.A.* 10:5-5(n). But

according to Complainants' construction of the LAD, the Association could not refuse to allow a same-sex couple to conduct a civil-union ceremony in its Pavilion, even though the Association has determined that such an inherently expressive event would not promote—and, in fact, would directly contradict—the religious principles for which it is maintained. The government's interest in the LAD is affected almost identically by both decisions, but the law prohibits one and not the other. This unexplainable underinclusiveness shows that the LAD does not satisfy the general-applicability requirement, and thus strict scrutiny applies.

2. The Association Has Presented a Valid Hybrid Claim.

Even if the governing legal scheme is both neutral and generally applicable, strict scrutiny should apply because this application of the LAD "incidentally burdens rights protected by the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech[.]" *Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 165 n.26; *see also South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 150 *N.J.* 575, 598-600 (1997) (recognizing that the "'compelling state interest' analysis [is] required for hybrid claims"); *Blackhawk*, *supra*, 381 *F.*3d at 207 (recognizing hybrid claims). Here, the Association has combined the burden on its free-exercise rights with the burden on its rights of expressive association and free speech. This constitutes a valid hybrid claim, and thus strict scrutiny applies.

B. Applying the LAD to Force the Association to Host a Civil-Union Ceremony Does Not Satisfy Strict Scrutiny.

Strict-scrutiny analysis is "the most rigorous of scrutiny"; it requires that the application of the LAD to the Association under these circumstances "advance[s] interests of the highest order and [is] narrowly tailored in pursuit of those interests." *Lukumi*, *supra*, 508 *U.S.* at 546, 113 *S. Ct.* at 2233. The burden of satisfying this stringent test rests on Complainants. *See*

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 *U.S.* 707, 718, 101 *S. Ct.* 1425, 1432, 67 *L. Ed.* 2d 624 (1981).

Strict-scrutiny analysis "look[s] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[s] the asserted harm of granting *specific exemptions to particular religious claimants.*" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 *U.S.* 418, 431, 126 *S. Ct.* 1211, 1220, 163 *L. Ed.* 2d 1017 (2006) (emphasis added); *see also Wisconsin v. Yoder*, 406 *U.S.* 205, 221, 92 *S. Ct.* 1526, 1536, 32 *L. Ed.* 2d 15 (1972) (recognizing that the Court "must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the . . . exemption" for the particular religiously burdened group). Here, the LAD seeks to further the generalized state interest in preventing civil-union-status discrimination, but Complainants cannot demonstrate, as they must under strict scrutiny, that this state interest is materially undermined by granting an exemption to the Association.

The existence of the DCR's place-of-worship policy—not to mention the LAD's many religiously based statutory exemptions—fatally destroys any suggestion that the State's interests would be materially burdened by exempting the Association's Wedding Ministry from the LAD's reach. If, as the DCR has long said in administering its place-of-worship policy, a religious organization is "free to practice discrimination, . . . as dictated by [its] faith, [by] denying access to and use of any place of worship under [its] care," *see* Supp. Aff. of Stewart at ¶ 20 (R. Ex. 4-A), then the State cannot justify punishing the Association for its religiously motivated decision to prohibit in one of its places of worship a ceremony that violates its sincerely held religious beliefs. *See Gonzales*, *supra*, 546 *U.S.* at 433, 126 *S. Ct.* at 1221-22 (finding strict-scrutiny not satisfied where the government already granted a broad religious

exemption). After all, "a law cannot be regarded as protecting an interest of the highest order when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, *supra*, 508 *U.S.* at 547, 113 *S. Ct.* at 2234 (quotation marks and alterations omitted).

Stated differently, when focusing on the specific circumstances of this case, as is required under strict-scrutiny analysis, the particularized state interest in applying the LAD here is much "less substantial" than—and perhaps even inconsequential compared to—the generalized state interest in preventing discrimination. *See Yoder*, 406 *U.S.* at 228-29, 92 *S. Ct.* at 1540 ("[The governmental] interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally"). Again, as demonstrated by the DCR's place-of-worship policy and the LAD's many religiously based statutory exemptions, the state interest in applying the LAD to dictate the actions of religious organizations—particularly in their places of worship—are much less important than the state interest in controlling the actions of nonreligious organizations.

Additionally, preventing the novel type of discrimination that is allegedly at issue in this case, civil-union-status discrimination, does not amount to a compelling interest of the highest order because "civil-union status," unlike race or sex, is not protected under the New Jersey Constitution, federal law, or the United States Constitution. *See Attorney General v. Desilets*, 636 *N.E.*2d 233, 239 (Mass. 1994) ("Because there is no constitutionally based prohibition against discriminating on the basis of marital status, marital status discrimination is of a lower order than those discriminations to which [the state constitution] refers"). And finally, the Legislature has indicated that the State has *no* interest in preventing "religious organizations" from addressing issues involving the solemnization of marriages and civil unions, as the Association seeks to do here, "according to the[ir] rules and customs." *See N.J.S.A.* 37:1-13.

Complainants are thus unable to establish any governmental interest in forcing the Association to host civil-union ceremonies, let alone a compelling state interest of the highest order.

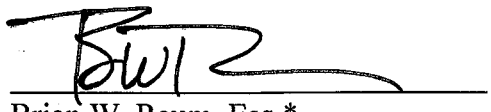
But even if the State were to have a compelling interest in preventing civil-union-status discrimination, the DCR's decision to punish the Association for upholding its religious principles in its places of worship, while allowing other religious organizations to "practice discrimination . . . [by] denying access to and use of [their] place[s] of worship," *see* Supp. Aff. of Stewart at ¶ 20 (R. Ex. 4-A), is "not narrowly tailored to promote that interest." *See Tenafly Eruv Ass'n*, *supra*, 309 *F.*3d at 172. Most obviously, the State could more narrowly tailor its governing legal scheme by exempting the Association from the LAD's reach when operating its ministries in its places of worship.

CONCLUSION

For the foregoing reasons, the Association respectfully requests that all Complainants' claims be dismissed.

Dated: July 28, 2010

Respectfully submitted,



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Attorneys for Respondent Ocean Grove Camp Meeting Association

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CRT 6145-09

AGENCY DKT. NO. PN34XB-03008

HARRIET BERNSTEIN, LUISA PASTER,
AND J. FRANK VESPA-PAPALEO, DIRECTOR,
NEW JERSEY DIVISION ON CIVIL RIGHTS,

Petitioners,

v.

OCEAN GROVE CAMP MEETING ASSOCIATION,

Respondent.

Lawrence Lustberg, Esq., for petitioners Harriet Bernstein and Luisa Paster (Gibbons, P.C., attorneys)

Jean LoCicero, Esq., co-counsel for petitioners Harriet Bernstein and Luisa Paster

James A. Campbell, Esq., member of the Arizona Bar, admitted pro hac vice, for respondent. Attorney of Record: Michael P. Laffey, Esq. (Messina Law Firm, P.C., attorneys)

Record Closed: December 30, 2011 Decided: January 12, 2012

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a decision in March 2007 by respondent, the Ocean Grove Camp Meeting Association, to deny petitioners Harriet Bernstein and Luisa Paster the use of its Boardwalk Pavilion for their civil-union ceremony. Petitioners filed a complaint with the Division on Civil Rights, which in December 2008 found probable cause to credit their claim under the Law Against Discrimination (LAD), N.J.S.A. 10:5-5 et seq. In July 2009 the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 to -23, and the Division was added as a complainant. After discovery and the adjournment of scheduled hearing dates, the parties agreed to proceed by way of cross-motions for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995).

The relevant facts for purposes of the cross-motions are substantially undisputed. Petitioners Bernstein and Paster are residents of Ocean Grove, a square mile of real estate owned by respondent, a non-profit organization. Respondent is closely associated with the United Methodist Church; the voting members of the Board of Trustees must either be clergy of or hold membership in the church. Respondent operates a number of religious institutions over which it maintains close control and also leases much of its property for business and residential purposes.

The Boardwalk Pavilion is an open-air wood-framed seating area along the boardwalk facing the Atlantic Ocean. At the time of denial in March 2007, the Pavilion was used primarily as a venue for religious programming, but respondent also hosted community and charitable events and rented the space for weddings. The fee for a wedding was $250. The form used by respondent to rent the Pavilion did not inquire into religious affiliation and staff typically asked no questions along these lines. The form was used primarily to record bookings and determine availability. When not in use by some organization, the Pavilion is open to passers-by along the boardwalk to sit and take in the scene.

Petitioners completed the appropriate form and paid the required deposit. Their application was denied soon thereafter and their deposit was returned. Petitioners sought an explanation and were informed that the notion of civil union conflicted with

scriptural teaching regarding homosexuality and that respondent could not condone such a ceremony at the Pavilion. This was the first time in anyone's memory that a denial was based on a reason other than availability. During this period respondent maintained a web page called "An Ocean Grove Wedding," which advertised the Pavilion as a wedding venue. The page was silent regarding respondent's views on marriage. After the incident that gave rise to this proceeding, respondent stopped renting the Pavilion and currently uses it exclusively for programming that it sponsors, or co-sponsors.

In July 1989 respondent applied for a Green Acres real-estate tax exemption for Lot 1, Block 1.01, which includes the Pavilion and the adjacent boardwalk and beach area. The application describes the area as public in nature. The Green Acres program is designed to preserve open space and the statutory scheme authorizes a tax exemption for non-profit corporations utilizing property for conservation or recreational purposes. One condition of the exemption is that the property be "open for public use on an equal basis," N.J.S.A. 54:4-3.66; N.J.A.C. 7:35-1.4(a)(2).

Neptune Township, the municipality within which respondent is located, opposed the application on grounds that respondent is governed by religious restrictions that make equal-access doubtful. At a public hearing conducted by the Department of Environmental Protection in September 1989, respondent represented that the Pavilion was available for public use without reservation. Following the hearing the Department approved the tax exemption on certain conditions, one of which required the property to be open for public use on an equal basis. Respondent renewed this application every three years as required, and the tax exemption was continued through the period in question here with the same condition for equal access. Following the events that led to this proceeding, respondent applied once again to renew its real-estate tax exemption. The Department denied that portion of the exemption relating to the Pavilion, concluding that the Pavilion was not available on an equal basis. This is the substance of the record.

The LAD makes it unlawful for the owner of "any place of public accommodation" to refuse its use on the basis of sexual orientation or civil-union status, N.J.S.A. 10:5-

12(f). Our courts have evolved tests for assessing whether a location is one of public accommodation.[1] We look first to the statute. The LAD broadly defines public accommodation to include any "boardwalk, or seashore accommodation; any auditorium, meeting place, or hall," N.J.S.A. 10:5-5(l). The Boardwalk Pavilion as a structure falls within or near these examples and thus has the look of a place of public accommodation. Searching further we inquire as to ties with government, Ellison v. Creative Learning Ctr., 383 N.J. Super. 581 (App. Div. 2006). Respondent's Green Acres tax exemption is particularly relevant here. One condition of that exemption was that the entire lot, which includes the Pavilion, remains open to the public on an equal basis. That was the promise respondent made to the State of New Jersey. The State understood that promise to encompass activities within the Pavilion, including wedding ceremonies. The DEP Commissioner's view on the meaning of a statute within the Department's orbit is entitled to deference, see Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474 (2008).

When respondent first applied for a Green Acres tax exemption in 1989, civil unions were not yet legal in New Jersey, and thus whether the Pavilion was thereby a place of public accommodation may have been a matter of indifference. Respondent is unconcerned that same-gender couples take in the sea air at the Pavilion, or participate in a Pavilion activity. In late 2006, the New Jersey Supreme Court decided Lewis v. Harris, 188 N.J. 415 (2006), granting same-sex couples equal rights under the New Jersey Constitution. This was quickly incorporated into legislation, N.J.S.A. 37:1-28. Thus, once civil unions became lawful and the subject of anti-discrimination law, weddings at the Boardwalk Pavilion were vulnerable to attack.

Respondent argues that it didn't need a Green Acres tax exemption for the Pavilion; it could at any time have obtained the same benefit by applying for a tax exemption as a religious organization. Indeed, after these events that is exactly what it did. We are, however, bound by the facts that were, not those that might have been, or that came to pass in the aftermath of petitioners' application. Respondent accepted a particular form of tax exemption that required it to keep the Pavilion open to the public

[1] The term "place" can extend beyond fixed locations, but that discussion is unnecessary here.

on an equal basis, N.J.S.A. 54:4-3.64; N.J.A.C. 7:35-1.4. Neptune Township was skeptical that this could be achieved, but respondent persuaded the DEP and renewed that promise every three years. Thus, it not only interacted with government, it acknowledged the very thing that the interaction test seeks to assess.

Respondent also solicited business for the Pavilion in a web page that advertised "An Ocean Grove Wedding." There it presented itself to the public at large as a wedding venue without any mention of preconditions along doctrinal lines. This too is a factor in assessing whether a location is a public accommodation, see Clover Hill Swimming Club, Inc. v. Goldsboro, 47 N.J. 25 (1966).

The inquiry does not end with a determination that the Boardwalk Pavilion was, in March 2007, a place of public accommodation. As a religious organization that deems same-gender unions sinful, respondent is loath to be associated with such ceremonies and maintains that compelling this through the LAD violates its right of expressive association, free speech and free exercise of religion, see, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). I disagree.

There is no question that respondent is fundamentally a religious organization, free to frame its mission without governmental oversight or intrusion, State v. Celmer, 80 N.J. 405 (1979). The certification of its president maintains that the Pavilion was used as part of its "wedding ministry," a cause inherently religious, see Wazeerud-Din v. Goodwill Home and Missions, Inc., 325 N.J. Super. 3 (App. Div. 1999). Any wedding of heterosexual couples at the Pavilion, whether of its own denomination, other denominations within Christianity, or non-Christian religions, or even secular weddings, nonetheless promoted marriage between a man and a woman. This element of its ministry runs through all of the weddings it permitted and is not undermined by outreach to other traditions, as "every marital union between a man and a woman represents the union of Jesus Christ and his Church." That it had never before declined a wedding, other than for scheduling conflicts, only means that it had never before been asked to permit a same-gender service.

While a motion for summary decision is not the place for fact finding, neither may an opponent of the motion blunt summary decision with bald oppositional statements, Brill, supra, 142 N.J. 520. Respondent filed a certification repeatedly referring to a "Wedding Ministry." Yet, respondent's interrogatory answers concede that it created no writing on the subject before March 2007, though weddings at this location had been conducted for at least ten years. There is no indication that couples, particularly those that chose secular vows, or that were of other faiths, were ever told that they were participating in a ministry. As respondent would know better than most, passions around such questions can run high, and the absence of disclosure is curious. Respondent has a lovely venue for weddings and is an organization that undoubtedly supports the idea of weddings. It does not follow, however, that it had a "wedding ministry," a transformative phrase that evokes religious mission. The doctrinal foundations for a trans-denominational wedding ministry limited to heterosexual couples might well be found in the biblical citations to which respondent refers, as well as in its Book of Discipline. We do not here debate theology or question beliefs. My point simply is that if such a ministry had existed at the time in question, we would expect to find some trace of it.

From this record it appears respondent was renting space at the Pavilion for weddings, an activity largely detached from associational expression or speech, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980). Respondent did not inquire into religious beliefs or practice because it did not sponsor, or otherwise control, these weddings. Some volunteers may have been around to observe or be helpful, but no more. These ceremonies might have been devoid of references to Christian doctrine, might have contained language or symbolism antithetical to Christian doctrine, and any passerby could stop to listen. The arm's length nature of the transactions gave respondent a comfortable distance from notions incompatible with its own beliefs. That same distance pertained to civil unions.

As to "free exercise," the LAD is a neutral law of general application designed to uncover and eradicate discrimination; it is not focused on or hostile to religion.[2] To the contrary, it carves away exceptions on behalf of religious organizations, N.J.S.A. 10:5-5(l), (n). I do not believe that the facts pose a true question of religious freedom, but were they to, the matter would not be governed by the high bar of "strict scrutiny," but by a much lower standard that tolerates some intrusion into religious freedom to balance other important societal goals, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993); Employment Div., Dep't of Human Resources of Ore. v. Smith, 494 U.S. 872, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990). Respondent can rearrange Pavilion operations, as it has done, to avoid this clash with the LAD. It was not, however, free to promise equal access, to rent wedding space to heterosexual couples irrespective of their tradition, and then except these petitioners.

Based on the foregoing, I **CONCLUDE** that respondent violated the LAD when it refused to conduct a civil-union ceremony for Ms. Bernstein and Ms. Paster. Thus, petitioners' motion is **GRANTED**; respondent's motion is **DENIED**.

Petitioners have not sought to establish damages and appear fundamentally to be seeking the finding that they were wronged and that respondent was not free to exclude same-sex unions under the conditions that then existed. It does not appear that respondent acted with ill motive. Respondent opposes same-sex unions as a matter of religious belief, and in 2007 found itself on the wrong side of recent changes in the law. I have considered the possibility of a nominal penalty, but conclude that this would serve little. The finding of wrongdoing should be an adequate redress.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS** for consideration.

[2] Although the Division has acknowledged that it does not pursue religious organizations for conduct that might otherwise be discriminatory, the instant matter involves the secular activity of a religious organization in renting pavilion space.

This recommended decision may be adopted, modified or rejected by **DIRECTOR OF THE DIVISION ON CIVIL RIGHTS,** who by law is authorized to make a final decision in this matter. If the Director of the Division on Civil Rights does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ASSISTANT DIRECTOR, BUREAU OF POLICY, DIVISION ON CIVIL RIGHTS, 140 E. Front Street, PO Box 089, Trenton, New Jersey 08625-0089,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 12, 2012
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency: January 12, 2012

Date Mailed to Parties: January 12, 2012

mph

ACLU, NEW JERSEY; JANUARY 13, 2012.
URL: HTTPS://WWW.ACLU-NJ.ORG/EN/PRESS-RELEASES/JUDGE-RULES-FAVOR-SAME-SEX-COUPLE-DISCRIMINATION-CASE

Judge rules in favor of same-sex couple in discrimination case.

Ocean Grove Camp Meeting Association broke state's discrimination law when it denied use of its pavilion for couple's civil union ceremony

NEWARK – A state administrative law judge has ruled (50k PDF) that the Ocean Grove Camp Meeting Association violated the state's Law Against Discrimination when it denied Ocean Grove residents Harriet Bernstein and Luisa Paster the use of its boardwalk pavilion for their 2007 civil union ceremony. The association had allowed members of the public to rent the pavilion and had never before declined a permit other than for scheduling conflicts until it received Paster and Bernstein's reservation request. The association rejected the couple's application to use the space, stating that civil unions violated its Methodist doctrine.

"The Camp Meeting Association could have used the pavilion exclusively for its own purposes," said Lawrence Lustberg of Gibbons, P.C., who represents the couple as a cooperating attorney for the ACLU-NJ. "The judge found, however, that the association opened the pavilion up to the public and thus was obligated to follow anti-discrimination laws."

"We are pleased with the judge's findings," said Harriet Bernstein. "When we first started planning our civil union, we had no idea that it would come to this. We weren't asking the association to change their beliefs. We just wanted them to give us the same opportunity to use a beautiful space that we had seen open for public use."

Paster and Bernstein celebrated their civil union at a fishing pier in Ocean Grove, a quarter mile from the pavilion on June 30, 2007. By then, the community rallied around the couple, showing support by raising flags around town that symbolized LGBT equality.

"Fortunately, out of this painful incident, Ocean Grove residents have a renewed sense of community and have come together to support equality," said Luisa Paster.

In his written decision, Judge Solomon A. Metzger of the Office of Administrative Law found that in March 2007, when Paster and Bernstein filled out a reservation form, the pavilion was a public accommodation. The judge determined that the Ocean Grove Camp Meeting Association breached its agreement to make the pavilion available to the public on an equal basis. The association was also required to make the pavilion public in exchange for a state tax exemption it received that requires equal access on a non-discriminatory basis. Metzger also noted that while the association is free to practice its mission without government oversight, it had never attached any religious ministry to the wedding venue until it received Paster and Bernstein's application.

“(The association) was not, however, free to promise equal access to rent wedding space to heterosexual couples irrespective of their tradition and then except (Bernstein and Paster),” Judge Metzger stated.

The administrative law judge’s decision is sent to the Director of the Division on Civil Rights who has 45 days to adopt, modify or reject it as part of the Director’s final decision; otherwise, it becomes a final decision. Once a final decision is issued, a party may appeal to the Appellate Division of the Superior Court.

Bernstein, 70, a grandmother and retired school administrator and Paster, 64, a retired academic librarian, met at a retreat in the Poconos in 2000. The couple decided to celebrate their commitment with a civil union in 2007, shortly after New Jersey passed a law allowing for civil unions. The couple, who live in the Ocean Grove section of Neptune, wanted their ceremony to take place at the Ocean Grove Boardwalk Pavilion, an open-air wood-framed seating area facing the Atlantic Ocean.

The pavilion was used for community and charitable events and the owners of the property, Ocean Grove Camp Meeting Association, received a tax exemption from the state Green Acres program, which provides exemptions to non-profit organizations who use their property for recreational or conservation purposes. An important condition of the exemption is that the property be “open for public use on an equal basis.”

In March 2007, the couple went to the office of the Ocean Grove Camp Meeting Association and filled out an application to reserve the pavilion for their civil union. Days later, association officials denied their application and returned their $250 deposit. When Paster and Bernstein sought an explanation, they were told civil unions violated the group’s Methodist principles.

Paster and Bernstein filed a complaint with the state Division on Civil Rights.

In December 2008, the state Division on Civil Rights found probable cause that the association violated the state’s anti-discrimination law. The case proceeded to the state Administrative Law Judge for disposition.

“This decision affirms New Jersey’s strong protections against discrimination,” said Jeanne LoCicero, ACLU-NJ Deputy Legal Director. “When you open your doors to the public, you can’t treat same-sex couples differently.”

The case is captioned Bernstein et al v. Ocean Grove Camp Meeting Association, OAL DKT. NO. CRT 6145-09.